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THE LAW OF AGENCY

THE
LAW OF AGENCY.

BY

R. GRESLEY WOODYATT,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.

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PREFACE.

In writing this handbook on the Law of Agency I have adopted the plan of stating the law which governs the subject, in a series of concise rules, supported in the text by the decided cases upon which those rules are founded. In doing this I have departed from the usual practice of merely giving references to cases in footnotes: my object being not only to provide the reader with a number of references, but also to set out for him in the text such extracts from the cases themselves as seem necessary to support and illustrate the rules and principles laid down.

In the Appendix will be found the Factors Act, 1889 (52 & 53 Vict. c. 45), and Part IV. of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); which, together with the various sections of Statutes which I have found necessary to introduce into the text, will, I think, comprise all the Statutory Law which bears upon the subject.

I trust that, by adopting this arrangement, I shall render my book useful, not only as a work of reference for practitioners, but also as a guide to students of the Law of Agency.

R. GRESLEY WOODYATT.

New Court, Temple, E.C.,
July, 1900.

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THE LAW OF AGENCY.

CHAPTER I.

FORMATION OF AGENCY.

Definition of Agency.—It is not very easy to give a concise and at the same time sufficiently accurate definition of the term Agency.

In Evans on Agency (2nd ed. p. 1) we find it stated that an agent is, "A person duly authorized to act on behalf of another; or one whose unauthorized act has been duly ratified." This definition is, however, open to the objection of not being sufficiently comprehensive, seeing that it does not include those cases of agency which arise from necessity. In *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339. C. A., we find it laid down, that the relation of principal and agent requires the "consensus" of both parties; and that such relation must be assented to either expressly, impliedly, or by subsequent ratification.

In Kent's Commentaries (12 ed. vol. ii. p. 914) we find the following statement: "Agency is founded on a contract, express or implied, by which one of the parties confides to the other the management of some business to be contracted in his name or on his account, and by which the other assumes to do the business and to render an account of it." But this definition also seems too narrow,

as it fails to include, not only agencies arising from necessity, but also the more extensive class of agencies created by subsequent ratification.

In trying to arrive at a good definition of the term agency, we must carefully bear in mind that Agency and Employment are by no means synonymous terms; agency being merely a particular kind of employment. Perhaps we shall define agency sufficiently accurately if we say that it is—The employment by one person or persons of another person or persons, for the purpose of creating legal relations between the employer and a third person or persons.

The person who confers on another the right to act on his behalf is generally called the Principal, while the person so employed is called the Agent, Attorney, or Delegate: while the right to so act on his behalf is called the Power, or Authority.

Persons who may be Principals and Agents.—As a general rule whatever a person can do in his own right, he can also do through an agent. But a man cannot delegate to an agent the performance of an act of a purely personal nature. Neither can a man bind himself by any representation made through an agent, regarding the character, conduct, credit, ability, trade, or dealing of any other person, with the intent that such other person may obtain credit, money or goods; for such a representation, in order to be binding upon a man, must be made in writing and signed by himself personally—*vide* provisions of 9 Geo. IV. c. 14, at p. 121, *post*.

A person may be either totally or partially incapable of appointing an agent to act for him; thus lunatics and idiots, being totally incapable of contracting for themselves, are obviously totally incapable of appointing agents to act for them. On the other hand, married women, and infants, have a power of appointing agents co-extensive with their own limited capacity to contract for themselves.

As a general rule any one is capable of acting as an agent for another; for it is not necessary for a person to be able to contract in his own right in order to qualify him to contract on behalf of another; but there are a few exceptions to this rule; thus, lunatics and idiots cannot act as agents; seeing that they are obviously incapable of transacting any business at all. And though infants and married women can, generally, act as agents, still they cannot act as "next-friends," or "guardians ad litem"—*vide Thynne* v. *St. Maur* (1887), 34 Ch. D. 465.

Neither can an infant execute a "power coupled with an interest," except where an intention appears that it shall be exercisable during minority—*vide Hearle* v. *Greenbank* (1749), 3 Atk. 695, and *In re Cardross' Settlement* (1878), 7 Ch. D. 728.

Appointment of Agents.—As a general rule an agent may be appointed, without any formality, by mere word of mouth, or by implication. But there are a few cases where a certain form of appointment is required by law; thus, where an agent is required to contract by deed, his authority to do so has to be conferred upon him by deed, *e.g.* where the principal is a corporation, and it is required to authorize the agent to make contracts which the corporation can only make under seal, then the agent must be appointed under seal. Again, where an agent is required to make a contract which falls within sections 1 and 3 of the Statute of Frauds (29 Car. II. c. 3), the agent must be appointed by writing. But contracts which fall within sections 4 and 17 of the Statute of Frauds, though bad unless they themselves are made in writing, may be validly made by orally authorized agents.

Different Methods of appointing Agents.—1. He may be appointed by mere word of mouth.

2. He may be appointed by writing not under seal.

3. He may be appointed by writing under seal. Where

the authority is given under seal it is called a Power, Warrant, or Letter of Attorney.

4. His appointment may be implied from conduct. Such agencies are often called "Agencies by Estoppel."

Pole v. *Leask* (1863), 33 L. J. Ch. 162; in this case Lord Cranworth said; "Where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed."

Pickering v. *Busk* (1812), 15 East. 38; here the plaintiff had employed a broker to purchase a certain quantity of hemp for him, which after its purchase was at the plaintiff's request left lying at the wharf, transferred in the wharfinger's books to the name of the broker; the broker sold the hemp, and it was decided that the plaintiff was "estopped" by his conduct from denying that the broker had authority to do so. In this case Lord Ellenborough said; "Strangers can only look to the acts of the parties, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."

Cole v. *London & North-Western Bank* (1875), L. R. 10 C. P. 354; here Lord Blackburn said; "If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at Common Law precluded as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it."

Upon the principle laid down in the above cases, if a master has held out his servant as his agent, by

habitually allowing him to pledge his credit with a tradesman, the servant is held to be his master's agent for that purpose; and the master will be liable upon his contracts until the tradesman has received notice of the termination of the authority: *e.g.* if a master habitually pays for oats bought for his horse by his groom, the latter would be held to be his general agent for the purpose of buying a reasonable quantity of oats; but not for the purpose of buying anything else. On the same principle, if a husband has habitually allowed his wife to pledge his credit with a tradesman, he will be liable upon her contracts until the tradesman has received notice of the termination of the authority—*vide Drew* v. *Nunn* (1879), 4 Q. B. D. 661. C.A., and *Debenham* v. *Mellon* (1880), 5 Q. B. D. 403, & 6 App. Cas. 24.

But a wife has no inherent authority *quâ* wife to pledge her husband's credit, even for necessaries; and where she does bind him she does so merely as his agent—*vide Eastland* v. *Burchell* (1878), 3 Q. B. D. 436, and *Debenham* v. *Mellon, ubi supra.* In the latter case it was held that a husband who was willing and able to supply his wife with necessaries, and who had forbidden her to pledge his credit, was not liable to a tradesman who, having had no previous dealings with the wife with the husband's consent, had supplied her with necessary articles of dress, even though the tradesman had received no notice of the husband's prohibition.

5. His appointment may be implied in law from necessity, in certain cases; in this kind of agency the relation of principal and agent is implied by construction of law, although no such relation actually exists in fact.

We find in Story on Agency (9th ed., sect. 142) the following statement: "The same doctrine (*i.e.* of necessity) would seem to apply to the case of a mere stranger

acting for the principal, without any authority, under circumstances of positive necessity; as for example in the case of a stranger interfering to prevent irreparable injury to perishable property occasioned by fire, shipwreck, inundation, or other casualties." It seems, however, clear, from the following cases, that, in English Law, the doctrine of agency from necessity can only arise in certain well-known and exceptional cases.

Nicholson v. *Chapman* (1793), 2. H. Bl. 254, & 3 R.R. 374; here it was held that the doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as the master of a ship, or the acceptor of a bill of exchange who accepts to save the drawer's honour.

Hawtayne v. *Bourne* (1841), 7. M. & W. 595, & 5 Jur. 118; here it was held that an agent who carries on a concern for another party has no authority implied by law to raise money on the credit of his principals, even in the event of a sudden emergency or necessity arising: but that such an authority can only be found in the cases of a master of a ship, and of an acceptor of a bill who accepts to save the drawer's honour.

Cox v. *The Midland Counties Railway Company* (1849), 3 Ex. 268, & 13 Jur. 65; in this case, after the Railway Company had been incorporated by statute, an accident occurred on the line to a passenger through the negligence of a servant of the company. The Court held that neither the engine-driver, nor the guard at the station where it took place, nor the superintendent of the traffic department, had any implied authority to make contracts, obligatory on the company, with medical men called in to attend an injured person. Parke B., in delivering the judgment of the court, said, "The employment of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances: as this Court held in the case of an agent to a mine (*Hawtayne* v. *Bourne* (1841), 7 M. & W.

595), where the question was as to his power to bind his principals by borrowing money when an emergency arose, in which it was highly expedient to do so; and it was held he had no such power."

Bank of New South Wales v. *Owston* (1879), 4 App. Cas. 270; here the Privy Council held, that the bank (the principal) was not liable for the acting bank manager having authorized criminal proceedings to be taken against a merchant in good position, in order to obtain more quickly from him a bill which the bank claimed. They laid down, as the ground of their decision, that an authority might be general, or it might be special and derived from the emergency of the particular occasion; in the former case it would be enough, commonly, to show that the agent was acting in what he did on behalf of the principal; but in the latter case evidence would have to be given of a state of facts which showed that such emergency was present, or from which it might reasonably be supposed to be present; for if it were otherwise the special authority would be equivalent to a general one.

Gwilliam v. *Twist & another* (1895), 2 Q. B. 84. C. A., & 11 T. L. R. 415; in this case while the defendants' omnibus was being driven by defendants' servant, a police constable, thinking the driver was drunk, ordered him to discontinue driving, the omnibus being then only a quarter mile from defendants' yard. The driver and conductor then authorized a man who chanced to be standing by, and who had formerly been a conductor to the defendants, to drive the omnibus home; he, through negligence while driving home, caused personal injuries to the plaintiff. The Court of Appeal held that as the defendants might easily have been communicated with, there was no necessity whatever for their servants to have employed another person; and that they were not liable for the negligence of the person so employed. In giving judgment, Lord Esher, M.R., said; "I am very much inclined to agree with the view taken by

Eyre, C.J., in the case of *Nicholson* v. *Chapman* (1793), 2 H. Bl. 254, and by Parke, B., in the case of *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595, to the effect that, this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship, or the acceptor of a bill of exchange for the honour of the drawer."

Smith, L.J., also said; "The impossibility of communicating with the principal is the foundation of the doctrine of an agent of necessity."

When a wife is living with her husband, and he refuses to provide her with proper necessaries, she is entitled to pledge his credit for the purpose of obtaining them. A wife also who is living apart from her husband owing to his desertion or other misconduct, if he will not provide her with proper necessaries, has the same right.

Debenham v. *Mellon* (1880), 5 Q. B. D. 403, & 6 App. Cas. 24; here Lord Selborne, L.C., said; "According to all the authorities there is no such mandate in law (*i.e.* no mandate making the wife the agent of the husband to pledge his credit) from the fact of marriage only, except in the particular case of necessity: a necessity which may arise when the husband has deserted his wife, or has by his conduct compelled her to live apart from him without properly providing for her; but not when the husband and wife are living together, and when the wife is properly maintained."

Johnson & others v. *Sumner* (1858), 27 L. J. Ex. 341, & 4 Jur. N.S. 462; here it was held that if a husband turns his wife away, and she is unable to maintain herself, she has an authority from necessity, to pledge his credit for goods supplied to her; but quære whether this rule holds good in a case where a labouring man turns away his wife, she being capable of earning as much as he; or where a man turns away his wife, she having a settlement double his income in amount.

But if a wife leaves her husband without good cause, and without his consent, she loses the right to supply herself with necessaries at his expense—*vide Eastland* v. *Burchell* (1878), 3 Q. B. D. 436.

If a husband and wife have agreed to live separately upon the terms that she shall accept an allowance, which is duly paid, she has no authority to pledge her husband's credit for necessaries, even though the allowance is inadequate—*vide Biffin* v. *Bignell* (1862), 7 H. & N. 877.

If a wife is living apart from her husband by reason of her adultery, she loses her right to pledge his credit for necessaries—*vide Cooper* v. *Lloyd* (1859), 6 C. B. N.S. 519.

But where a wife has committed adultery with her husband's connivance, and he subsequently turns her out-of-doors and leaves her without any means of support, he is liable for necessaries supplied for her maintenance—*vide Wilson* v. *Glossop* (1888), 20 Q. B. D. 354. C. A.

A ship-master has, as stated above, an implied authority to bind the owners of the ship or cargo, by acts done for their benefit, in a case of necessity or emergency, when he is unable to communicate with them.

Webster v. *Seekamp* (1821), 4 B. & Ald. 352; here it was held that a ship-master had an authority, in a case of necessity, in the owner's absence, to pledge the owner's credit for repairs done to the ship; and that in order to ascertain what was really necessary, it must be considered what a prudent owner would himself order if he were present.

The Bonaparte (1851), 8 Moo. P. C. 459; here it was held that a ship-master may, in a case of necessity, when he is unable to communicate with the owners, for the protection of their property, hypothecate the ship and the cargo.

Australian Steam Navigation Company v. *Morse* (1872),

L. R. 4 P. C. 222; here it was held that a ship-master may, in a case of necessity, in the absence of the owner, sell the cargo in the owner's interests: and it was laid down by the Court, that when an emergency casts upon a man the duty of taking some action for another, and he under that obligation takes the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of that other person, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it.

A common carrier by land has, in a case of necessity, an authority to pledge the owner's credit for the purpose of taking reasonable care of his goods—*vide Great Northern Railway Company* v. *Swaffield* (1874), L. R. 9 Ex. 132.

6. He may be appointed by subsequent ratification.

Wilson v. *Tumman* (1843), 6 M. & G. 236, & 6 Scott. N. R. 894; here Tindal, C.J., delivering the judgment of the Court, said; "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from the same act done by his previous authority."

Bird v. *Brown* (1850), 4 Ex. 786, & 14 Jur. 132; here it was laid down by the Court, that the maxim "Omnis ratihabitio retro trahitur et mandato æquiparatur" meant; firstly, as regards contracts, that if A unauthorized by B made a contract with C on his behalf, which B afterwards adopted and ratified, the contract would be dealt with as if having been made in the first instance with his authority; secondly, as regards torts, that if A

professing to act by B's authority did that which *primâ facie* amounted to a trespass, and B afterwards adopted and ratified his act, A would be treated as having from the beginning acted by his authority, and B would become a trespasser, unless he could justify the act.

But in order to constitute a valid and binding ratification, the following conditions must exist:—

(*a*) When an unauthorized agent does an act, which is to be subsequently ratified by another, he must, at the time that he does the act, have the intention of doing it on behalf of the principal who subsequently ratifies. But provided he has this intention in his mind, he need not at the time that he does the act profess to be acting on behalf of a principal, but may do the act in his own name.

Durant & Company v. *Roberts & Keighley, Maxsted & Company* (1900), 1 Q. B. 629. C. A.; in this case the defendant Roberts having been authorized by Keighley, Maxsted & Company, to purchase, on joint account of himself and them, certain quantities of wheat at certain prices, and having been unable to effect the purchases at the prices in question, without authority from Keighley, Maxsted & Company, bought the wheats from the plaintiffs at higher prices. The contracts in the contract notes purported to be made between plaintiffs and Roberts only, and it appeared that the latter, when making the contracts, did not mention any principal at all. Roberts having subsequently informed Keighley, Maxsted & Company's manager of the purchases, he said that he thought the wheats were worth the prices given, and told Roberts to take them. The plaintiffs having brought an action for non-acceptance of wheat sold by the plaintiffs to the defendants, verdict and judgment were entered for the defendants; and thereupon the plaintiffs applied to the Court of Appeal for a new trial.

At the hearing of the appeal it was contended for the

plaintiffs that Roberts had, when he made the contracts, intended to act on joint account of himself and Keighley, Maxsted & Company; and that the latter, having subsequently ratified the contracts, were liable upon them.

Collins and Romer, L.J.J., Smith, L.J., dissenting, held that when a contract is made by a person who intends to contract on behalf of another, but has no authority to do so, it may be ratified by that other, although the person who made the contract did not profess, at the time he made it, to be acting on behalf of a principal.

Upon these grounds the Court granted a new trial.

Although in the course of this appeal a great number of cases, in which the point of law in question had been raised, were mentioned and discussed, Collins and Romer, L.J.J., came to the conclusion that the point had never been actually decided before, and that they were therefore bound to decide this case in accordance with the general principles of the law of agency. Smith, L.J., on the contrary, held that the point in question had been for a long time settled, and that many judges had decided, that a contract made by an unauthorized agent can only be ratified by another, if such contract purports or professes to have been entered into on behalf of that other, or if the unauthorized agent, when he entered into the contract, assumed to be making it on behalf of that other.

Considering the number of cases which were discussed in this appeal, it is somewhat remarkable that the comparatively recent one of *Marsh* v. *Joseph* (1897), 1 Ch. 213. C. A., & 75 L. T. 558, was never mentioned: for, in delivering the united judgment of the Court of Appeal in that case, Lord Russell, C.J., said; "To constitute a binding adoption of acts *à priori* unauthorized, these conditions must exist—

(i.) The acts must have been done for and in the name of the supposed principal. . . ."

Now, though by reason of the facts proved in the case, the words, "The acts must have been done for and in the

name of the supposed principal," seem to have been, strictly speaking, merely "obita dicta," and not essential to the decision of the Court, still the principle therein stated was laid down in such general and decided terms that, it is submitted, the case would if cited, very materially have strengthened the contention of the defendants in *Durant & Company* v. *Roberts & Keighley, Maxsted & Company, ubi supra.*

(*b*) A principal's ratification of an unauthorized agent's act is only binding and valid if, at the time of ratification, such principal either had a full knowledge of the character of the act ratified, or else ratified it in such an unqualified manner as to show that he intended to take upon himself the responsibility of such act, whatever it might be.

Phosphate of Lime Company v. *Green* (1871), L. R. 7 C. P. 43; here Willes, J., said; "The principle by which a person, on whose behalf an act is done without his authority, may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition: in order to make it binding, it must be, either with full knowledge of the character of the act adopted, or with the intention to adopt it at all events, and under whatever circumstances."

Marsh v. *Joseph* (1897), 1 Ch. 213. C.A., & 75 L. T. 558; here Lord Russell, C.J., delivering the judgment of the Court of Appeal, said; "To constitute a binding adoption of acts *à priori* unauthorized, these conditions must exist—

(i.) The acts must have been done for and in the name of the supposed principal; and

(ii.) There must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were."

(*c*) The principal on whose behalf an unauthorized agent acts must be in existence at the time the act is done. This

rule is of great importance in regard to contracts made on behalf of projected companies.

Kelner v. *Baxter & others* (1866), L. R. 2 C. P. 174; here Baxter and two others, being among the promoters of a company (viz. The Gravesend Royal Alexander Hotel Company) not yet in existence, entered into certain contracts as its agent and in its name, expecting that the company, when it came into existence, would adopt and ratify these contracts; the company did do so, but subsequently became bankrupt, and the Court held that Baxter and the others were personally liable upon the said contracts. Willes, J., in giving judgment, said; "Ratification can only be by a person ascertained at the time of the act done—by a person in existence either actually, or in contemplation of law; as in the case of assignees of bankrupts, and administrators, whose title, for the protection of the estate, vests by relation."

The principle laid down in *Kelner* v. *Baxter*, *ubi supra*, was affirmed in *Melhado* v. *Porto Alegree Railway Company* (1874), L. R. 9 C. P. 503, *Re Empress Engineering Company* (1881), 16 Ch. D. 128. C. A., & *In re Northumberland Avenue Hotel* (1886), 33 Ch. D. 16. C. A.

But though a company cannot, after its formation, ratify a contract which was made before it came into existence, it can of course after its formation make a new contract to the same effect as the old one—*vide* the judgment of Jessel, M.R., in *Re Empress Engineering Company*, *ubi supra*, and of Lopes, L.J., in *In re Northumberland Avenue Hotel*, *ubi supra*.

(*d*) The act of an unauthorized agent must be one that is lawful in itself, and one that the principal at the time of ratification is himself legally capable of doing.

Brook v. *Hook* (1871), L. R. 6 Ex. 89; here it was held that an act which was, in its inception, illegal and void, could not be subsequently ratified.

La Banque Jacques-Cartier v. *La Banque d'Epargne* (1887), 13 App. Cas. 111; here it was laid down by the Privy Council; "Acquiescence and ratification must be founded on a full knowledge of the facts, and further, it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party, by his acquiescence in and adoption of the transaction."

Ashbury Railway Carriage Company v. *Riche* (1875), L. R. 7 H. L. 653; here it was held that a principal could only ratify a contract when at the time of such ratification he was himself competent to make such a contract.

Athy Guardians v. *Murphy* (1896), 1 Ir. R. 65; here it was held that, though a subsequent ratification may supply the want of authority in an agent at the time he accepts an offer, still it must be shown in such a case that there was such a contract, purporting to be made by and with the agent, as would be a binding contract if the agent had had the principal's authority.

But it seems that there is, in the case of contracts of marine insurance, an exception to the rule that a person can only ratify when he is at the time himself capable of making the contract in question.

Williams v. *North China Insurance Company* (1876), 1 C. P. D. 757; here it was held that, where a policy of marine insurance is made by one person on behalf of another, without that other's authority, it may be ratified, even after the loss of the property insured, by the person on whose behalf it was made, even though he knows of such loss at the time of the ratification; and that this was an exception to the general rule, that one who ratifies a contract must himself have power to make it, which was justified by convenience, and too long established to be questioned then.

(*e*) The principal's ratification must take place within a certain time, in order to be operative.

Walter v. *James* (1871), L. R. 6 Ex. 124; here it was held that where a payment had been made for the benefit of the debtor, by an agent who, though unauthorized to pay, expected to be reimbursed by the debtor, it was competent for the creditor by agreement with the professing agent, to rescind the transaction at any time before the debtor had ratified, and to repay the money; and thereupon the payment was at an end, and it was too late for the principal to ratify the agent's act.

Dibbins v. *Dibbins* (1896), 2 Ch. 348; here it was held that where a professing agent, without authority, had accepted an option of purchase of a share in a partnership, which option had to be exercised within a fixed time, in order to make the acceptance operative, the principal could only ratify before that time expired.

It seems, however, that when a professing agent has, without authority, entered into a contract, the supposed principal may adopt and ratify that contract within any reasonable time, although the other party thereto has in the mean time withdrawn his offer and repudiated the contract.

Bolton Partners v. *Lambert* (1889), 41 Ch. D. 295. C. A.; here the defendant made an offer of purchase to a certain Scratchley, who was agent to the plaintiff company, but was not authorized to make any contract for sale. Scratchley accepted the offer on behalf of the plaintiffs. Defendant subsequently withdrew his offer, and after such withdrawal the plaintiffs ratified Scratchley's acceptance of the offer. The plaintiffs brought an action for the specific performance of the contract. The Court of Appeal held that the ratification by the plaintiffs related back to the acceptance by Scratchley, and therefore the withdrawal by the defendant was inoperative, and the plaintiffs were entitled to specific performance.

In giving judgment Cotton, L.J., said; "The case of *Walter* v. *James* (1871), L. R. 6 Ex. 124, was relied on by the appellant; but in that case there was an agreement between the assumed agent of the defendant and the plaintiff, to cancel what had been done before any ratification by the defendant; in the present case there was no agreement made between Scratchley and the defendant that what had been done by Scratchley should be considered as null and void."

In re Tiedemann & Ledermann Frères (1899), 2 Q. B. 66; here the Court adopted and followed the principle laid down in the above case.

In re Portuguese Consolidated Copper Mines, Ex parte Badman (1890), 45 Ch. D. 16. C. A.; here Bowen, L.J, said; "Now I agree that, as this is an act done professedly on behalf of the company by persons who had not in fact authority to act as agents of the company, it does require ratification by the company to make the act a good one and to make it binding; and I also think that a ratification by the company must occur within a reasonable time."

(*f*) The principal must ratify an unauthorized agent's act in its entirety, or not at all; for he may not adopt the part that is advantageous to him, without also performing the part that is disadvantageous, but must take the burdens and liabilities as well as the benefits—*vide Bristow* v. *Whitmore* (1861), 9 H. L. 391, & 8 Jur. N.S. 291.

(*g*) Where an unauthorized agent's act is not a contract, the principal cannot subsequently ratify that act, when it is such that, if it had been an authorized act, it would either have imposed upon a third party a duty towards the principal (for non-performance of which a liability to damages would arise), or would have divested a right or estate already vested in a third party.

Doe d. Fisher v. *Cuthel* (1804), 5 East. 491; here a notice to quit was given to a tenant by two out of three

joint-tenants. The notice purported to be given in the name of all the three tenants, but was as a matter of fact given without the authority of the third; and the Court held that a subsequent ratification by the third joint-tenant did not make the notice valid, as the tenant was entitled to such a notice as he could act upon with certainty at the time it was given.

Doe d. Mann v. *Walters* (1830), 10 B. & C. 626; here it was held that where a notice to quit was given to a tenant by the landlord's agent, the agent must have authority to give it at the time when it began to operate, and that a subsequent recognition and ratification of the authority would not make the notice good.

Jones v. *Phipps* (1868), L. R. 3 Q. B. 567; here it was held that a notice to quit must be such as the tenant may safely act upon—that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord.

Coles v. *Bell* (1808), 1 Camp. 478 *n.*; in this case, which was an action for non-payment of goods, the demand for payment had been made by the clerk of the plaintiff's solicitor, who apparently had not been authorized by the plaintiff to make such demand: the Court held that the demand was insufficient, as it ought to have been made by some one authorized to give the defendant a discharge.

Different Methods of Ratification.—Ratification may take place, expressly, by word of mouth, by mere writing, by writing under seal; or may be implied by conduct. But if the act of the professed agent was done under seal, then the ratification, in order to be binding, must also be under seal.

With regard to ratification implied by conduct—*vide Prince* v. *Clark* (1823), 1 B. & C. 186; here it was held that where the relation of principal and agent exists between the parties, the unauthorized act of the agent

will be presumed to be ratified by mere acquiescence, unless the principal gives notice of repudiation of such act within a reasonable time after he is aware of it.

It would, moreover, seem that this principle of ratification by mere acquiescence will even apply in cases where the relation of principal and agent does not exist at all between the parties—*vide Bigg* v. *Strong* (1857), 3 Sm. & Gif. 592, and *Fothergill* v. *Phillips* (1871), L. R. 6 Ch. 770.

Where the unauthorized act of an agent is a tort, the principal, if he ratifies it, makes himself liable for it.

Bird v. *Brown* (1850), 4 Ex. 786, & 14 Jur. 132; here it was laid down that where a party, professing to act by the authority of another, does that which *primâ facie* amounts to a trespass, if the other party afterwards adopts his act, the professed agent is treated as having acted by his authority, and the other party becomes a trespasser unless he can justify the act. Also, that where an act, which if unauthorized would amount to a trespass, has been done in the name and on the behalf of another, without previous authority, a subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and treat it as having been done by his direction; but, that this doctrine must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might have himself lawfully done the act which he ratifies.

Hilbery v. *Hatton* (1864), 2 H. & C. 822; here it was held that, where a principal had ratified the unauthorized purchase by his agent in Africa of a ship which the vendor had no right to sell, he was liable for conversion, though at the time he ratified he was ignorant of the unlawfulness of the sale.

Freeman v. *Rosher* (1849), 13 Q. B. 780; here, however, a landlord was held not liable for the trespass and conversion of his agent (a broker), who in distraining had, without the landlord's authority, unlawfully removed a fixture. For though the landlord received the proceeds of the sale of the fixture with the rest of the proceeds of the distress, he did not know that any trespass or conversion had been committed, and the Court, therefore, considered that he had not ratified the agent's unlawful act.

It seems that the distinction between the last two cases is, that in *Hilbery* v. *Hatton* the act of the agent was in itself altogether unlawful; whereas in *Freeman* v. *Rosher* the act was in itself lawful, and the principal at the time he received the proceeds of the sale did not know that there had been any irregularity or unlawfulness in its execution. That this is the real distinction between the two cases in question is shown by the "ratio decidendi" in *Lewis* v. *Read & others* (1845), 14 L. J. Ex. 295.

The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), section 2, provides, "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

CHAPTER II.

AUTHORITY OF AGENTS.

THE extent of an agent's authority may either be defined by express agreement; or it may be implied from the conduct of the parties, and the circumstances of the business for which the agent is employed.

With regard to their authority agents may be divided into Universal Agents, General Agents, and Special Agents.

A Universal Agent is one who is appointed to do all acts on behalf of his principal, and whose authority is so extensive that it would be impossible for him to exceed it: but it seems probable that such an agent has never existed in fact.

A General Agent is one who is appointed to do all acts of a particular class on behalf of his principal. In the case of a general agent, the principal is bound, as between himself and a third party, not only by all the acts of his agent done within his actual authority, but also by all acts done within the scope of the apparent authority which he has held the agent out as possessing, or allowed him to assume. And where the agent does not come under one of those classes of mercantile agents the extent of whose authority is now settled by implication of law, then the extent of the authority will be inferred as a matter of fact from the conduct of the parties, and the general circumstances of the business for which the agent is employed;

and as a general rule whatever authority is necessary or ordinarily incidental to the carrying out of the object of the agency, will be implied. The principal can of course modify the general authority with which his agent is invested by specific instructions; but, unless such modification is known, or by reasonable diligence might have been known, to a third party, the principal will nevertheless be bound, as between himself and such third party, by all acts done within the apparent authority with which his agent is invested.

A Special Agent is one who is appointed to do a specific act on behalf of his principal. The extent of his authority is limited by the specific instructions under which he acts; and a third party in dealing with him is bound to ascertain what the actual extent of that authority is, and the principal is not bound by any acts done outside the scope of it. But it must be remembered that even if an agent is merely employed to do a specific act, if he falls within one of those classes of mercantile agents who have a certain authority implied in law, such as a broker or factor, then, although the principal may by specific instructions have modified that authority, unless the third party has notice of such modification, the principal will still be bound by all those acts of his agent which are done within the scope of the authority which such an agent ordinarily possesses.

But, of course, as between the principal and the agent, both in the case of General and Special Agency, the question whether the agent has exceeded his authority or not, always depends upon what was the actual authority given by the principal to his agent.

For the above rules, *vide* the following cases:—

Fenn v. *Harrison* (1790), 3 T. R. 757; here Buller, J., said; "If a person be appointed a general agent, the principal is bound by his acts. But an agent constituted for a particular purpose and under a limited and circumscribed power cannot bind the principal by any act in

which he exceeds his authority; for that would be to say that one man may bind another without his consent."

Whitehead v. *Tuckett* (1812), 15 East. 400; here Lord Ellenborough, C.J., said; "It may be material to consider the distinction between a particular and a general authority: the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances; whereas the former is confined to an individual instance."

Neeld v. *Duke of Beaufort* (1841), 5 Jur. 1123; (afterwards affirmed in the House of Lords (1844), 9 Jur. 813); here it was held that where a party dealing with another through an agent, entrusts the agent with a written consent on his part to do a specific act, but privately instructs him not to give the consent except upon certain conditions not specified in it, if the agent gives an unconditional consent the principal cannot subsequently repudiate the consent on the ground that the agent exceeded his authority.

Collen v. *Gardner* (1856), 21 Beav. 540; here it was held that when a general authority is given to an agent, it includes a power to do all those acts which are necessary or ordinarily incidental to the execution of the authority, and if notice is not given to a third party that the authority is specially limited, the principal is bound by all such acts.

The "*ratio decidendi*" of this case was followed in *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97.

Ireland v. *Livingstone* (1872), L. R. 5 H. L. 395, & 27 L. T. 79; here it was held by the House of Lords that where a principal gives an order to an agent in such ambiguous terms as to be susceptible of two different meanings; if the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be understood in the other sense.

National Bolivian Navigation Company v. *Wilson* (1880), 5 App. Cas. 176; here Lord Blackburn said; "Where

an agent is clothed with ostensible authority, no private instructions prevent his acts, within the scope of that authority, from binding his principal. Where his authority depends, and is known to those who deal with the agent to depend, on a written mandate, it may be necessary to produce or account for the non-production of that writing, in order to prove what was the scope of the agent's authority."

In re Cunningham & Company (1887), 36 Ch. D. 532, & 57 L. J. Ch. 169; here the manager of a company out in South America gave a promissory note for a certain sum of money, in the name of the company. It was held that the company could not be made liable upon such note, seeing that it was not proved that the giving of the note was necessary to the carrying on of the company's business, or that it was given in the ordinary scope of such business.

Levy v. *Richardson* (1889), W. N. 25; this being a case in which an agent was employed to do a specific act, Kay, J., held, that when a man deals with an agent knowing him to be an agent, he is bound to inquire as to the extent of the agency, and that if he does not inquire he must be taken to know the limit of the agent's authority, and anything done by the agent beyond that limit does not bind that agent's principal.

Watteau v. *Fenwick* (1893), 1 Q. B. 346, & 9 T. L. R. 133; this being a case in which an agent had been appointed as a general agent, viz. as manager of a "tied house" belonging to a firm of brewers, the Court held that the principal was liable for all the acts of the agent which were within the authority usually confided to an agent of that character, notwithstanding any private limitations as between the principal and the agent, put upon that authority.

Brocklesby v. *Temperance Permanent Building Society* (1895), App. Cas. 173; here a principal having entrusted his agent with securities and instructed him to raise a certain sum of money upon them, the agent borrowed a

larger sum upon them and fraudulently appropriated the difference. The lender acted *bonâ fide* in the matter, and without any knowledge of the limitation given by the principal to his agent. It was held that the principal could not redeem the securities without paying the lender all he had lent; even though the lender did not know, nor made any inquiry, whether the agent had authority to borrow at all, and though the agent had obtained the loan by fraud and forgery.

John Griffith Cycle Corporation v. *Humber & Company* (1899), 2 Q. B. 414. C. A.; here it was held that a letter written by an agent within the scope of his authority, which refers to and recognizes an unsigned document as containing the terms of a contract made by his principal, is a sufficient memorandum of the contract within the 4th section of the Statute of Frauds, and it is not necessary, in order to satisfy the Statute, that the principal should have authorized the agent to sign the letter as a record of the contract.

With regard to Bills of Exchange.—

Alexander v. *Mackenzie* (1848), 13 Jur. 346, & 6 C. B. 766; here it was held that when a bill is endorsed "per procuration," it intimates that the endorser is acting under a special authority, and the person who takes the bill is bound for his own safety to ascertain the extent of the authority.

Stagg v. *Elliott* (1862), 31 L. J. C. P. 260, & 6 L. T. 433; here it was laid down that when a Bill of Exchange purports on the face of it to be accepted "per procuration," it is a notice to any person who takes it that the agent so accepting has only a special or limited authority, and a holder cannot maintain an action against the principal if the authority has been exceeded.

And now by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), section 25, it is expressly provided; "A signature

by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."

It seems, however, that in cases of the signature of instruments, which do not fall within the above section of the Bills of Exchange Act of 1882, it does not necessarily follow, because an agent signs "per procuration," that the principal is not bound unless the agent in so signing is acting within the actual limits of his authority: thus if a general agent, acting within the ordinary scope of his employment, signs "per procuration," it seems that the principal would be bound even though the agent in the particular instance may have exceeded his actual authority —*vide Smith* v. *McGuire* (1858), 3 H. & N. 554, & 27 L. J. Ex. 465.

Mercantile Agents the extent of whose authority is implied in law.—There are certain classes of Mercantile Agents, who have a certain implied authority in regard to the business for which they are employed; the extent of the authority which is implied having been settled, either by the Common Law; or by Statutory Enactment, such as the Factors Act of 1889 (52 & 53 Vict. c. 45).

The following are some of the chief classes of such agents:—

Factors.—A Factor is a mercantile agent who is entrusted with the possession of goods, wares, or merchandise, for the purpose of selling them on behalf of his principal.

Stevens v. *Biller* (1883), 25 Ch. D. 31. C. A.; here Cotton, L.J., said; "He (a factor) is an agent entrusted with the possession of goods for the purpose of sale. That is the true definition of a factor."

A Factor is sometimes called a Commission Agent, or a Consignee. He has at Common Law the following implied authority:—

(*a*) An authority to sell in his own name: subject, however, to the rules that apply in cases of agents acting for undisclosed principals.

Baring v. *Corrie* (1818), 2 B. & Ald. 143; here it was held that a factor having possession of the goods has authority to sell in his own name without disclosing that of his principal, and usually does so; but a broker not having possession of the goods has no authority to sell in his own name; and if therefore he does so, he exceeds the scope of his authority and his principal is not bound.

(*b*) An authority to give a warranty when it is usual in the particular business in which he is employed—*vide Brady* v. *Todd* (1861), 9 C. B. N.S. 592.

(*c*) An authority to receive payments and to give receipts—*vide Drinkwater* v. *Goodwin* (1775), 1 Cowp. 251, & *Houghton* v. *Mathews* (1803), 3 B. & P. 488.

(*d*) An authority to sell on the usual terms of credit. *Houghton* v. *Mathews, ubi supra*; here Chambre, J., said; "There is no doubt of the authority of a factor to sell upon credit, though not particularly authorized by the terms of his commission so to do."

(*e*) An authority to insure for his principal—*vide Lucena* v. *Crauford* (1802), 2 B. & P. N. R. 269, and *Waters* v. *Monarch Life Assurance Company* (1848), 5 El. & B. 870.

(*f*) He has a general lien for the general balance of his account—*vide Kruger* v. *Wilcox* (1755), Amb. 252, and *Walker* v. *Birch* (1795), 6 T. R. 258—*vide* at p. 77, *post.*

The Common Law does not give a factor any implied authority to pledge goods, as this was not a necessary incident of his employment to sell them.

Cole v. *London & North Western Bank* (1875), L. R. 10 C. P. 354; here Blackburn, J., said; "The proposition that a factor is not by his employment authorized to pawn or pledge goods entrusted to him, was for many years controverted in point of fact. But it having once been decided as a matter of law that he is not so authorized, the Courts adhered to what had been so decided."

The Factors Acts, however, gave a factor an implied authority to pledge the goods. The Factors Acts of 1823, 1825, 1842, and 1877 have now been amended and consolidated in the Factors Act, 1889 (52 & 55 Vict. c. 45), which not only applies to factors, but to all mercantile agents; and also contains certain provisions regarding sellers and buyers of goods who have the possession of such goods, or of the documents of title to them. Section 1, sub-section (1), of the Factors Act, 1889, defines, for the purposes of the Act, a mercantile agent as follows: "The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." For the provisions of this Act regarding mercantile agents, see the Appendix, where the whole of the Act is set out.

Brokers.—A Broker has been defined by Story as, "An agent employed to make bargains and contracts in matters of trade, commerce, or navigation, between other parties, for a compensation, commonly called brokerage." But though brokers are employed for these purposes, it must be noted that all persons so employed are not properly speaking brokers; *e.g.* auctioneers and commission agents. There are various kinds of brokers, such as merchandise brokers, stockbrokers, insurance brokers, shipbrokers, and bill-brokers. A broker employed to sell goods has not, like a factor, the possession of the goods.

As a general rule a broker has not any implied authority like a factor, to contract in his own name—*vide Baring* v. *Corrie* (1818), 2 B. & Ald. 143.

Insurance brokers, however, can by reason of the provisions of 28 Geo. III. c. 56, contract in their own names —*vide Bell* v. *Gilson* (1798), 1 B. & P. 345, *De Vignier* v. *Swanson* (1798), 1 B. & P. 346, and *Browning* v. *Provincial Insurance Company of Canada* (1873), L. R. 5 P. C. 263. In the last case Sir M. Smith, delivering the judgment of the Court, said; "In England policies are usually made in the name of the insurance broker, and it was long ago decided that the broker need not be described as agent, to enable the principal to sue upon them (see *De Vignier* v. *Swanson* (1798), 1 B. & P. 346)."

It seems that, generally speaking, a policy of insurance is effected by brokers in their own names for the benefit either of a named principal, or of "whomsoever it may concern;" and that the action on a policy so effected may be brought either by the principal for whose benefit it was made, or by the broker who effected it.

In all cases where a broker is employed in a particular trade or market, he has an implied authority to act in accordance with the customs of such trade or market; *e.g.* he may by custom contract in his own name—*vide Cropper* v. *Cook* (1868), 3 C. P. 194.

On the Stock Exchange, brokers always contract in their own names, as the Stock Exchange does not recognize in its dealings any one but its own members.

A broker, even though contracting for a named principal, can of course, like any other agent, expressly contract in such terms as to make himself personally entitled and liable upon the contract.

A broker is primarily agent for the party who first

employs him; but he becomes agent also for the other party as soon as the contract is made. When the contract is made the broker reduces it to writing by entering it in his book and signing it; and he then sends copies of the entry in his book to each of the parties, which copies are respectively called the "bought note," (the buyer's copy), and the "sold note," (the seller's copy).

It seems now clearly settled that the signed entry in the broker's book constitutes the original contract between the parties, and is a sufficient memorandum to satisfy the Statute of Frauds; the bought and sold notes being considered as merely copies of this original contract—*vide Grant* v. *Fletcher* (1826), 5 B. & C. 436, *Thornton* v. *Charles* (1842), 9 M. & W. 802, *Sievewright* v. *Archibald* (1851), 17 Q. B. 115, and *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777.

It seems probable that when there is no entry, or only an unsigned one, in the broker's book, that the bought and sold notes can constitute a binding contract between the parties, and are a sufficient memorandum to satisfy the Statute of Frauds, provided that they correspond and state all the terms of the contract—*vide Goom* v. *Aflalo* (1826), 6 B. & C. 117, and *Sievewright* v. *Archibald*, *ubi supra*.

It also seems probable that either the bought or sold note alone, will satisfy the Statute, provided that no variance be proved between it and the other note, or between it and the signed entry in the broker's book: but when one note only is offered in evidence, the other party can put in the other, or the signed entry in the book, to prove a variance—*vide Hawes* v. *Forster* (1834), 1 Mood. & Rob. 368, and *Parton* v. *Crofts* (1864), 16 C. B. N.S. 11.

It is clearly settled that when the bought and sold notes vary, and there is no signed entry in the broker's book, or

any other writing showing the terms of the contract, that there is no valid contract between the parties—*vide Grant* v. *Fletcher, ubi supra,* and *Sievewright* v. *Archibald, ubi supra.*

According to Benjamin on Sales, there are four varieties of notes used in practice by brokers:—

1. Where the broker on the face of the notes professes to act as agent for parties whose names are disclosed. The bought note then begins, "Bought for B of A," and after setting out the terms of the contract, is signed, "C. broker." The sold note begins "Sold for A to B," and after setting out the terms of the contract, is signed, "C. broker."

2. Where the broker on the face of the notes professes to act as an agent, but does not disclose in the bought note the name of the seller, nor in the sold note the name of the buyer. The bought note would then begin, "Bought for B," and after setting out the terms of the contract, would be signed, "C. broker." The sold note would begin, "Sold for A," and after setting out the terms of the contract, would be signed, "C. broker."

3. Where the broker on the face of the notes appears as the principal, though he really is only an agent; as where he gives to the buyer a note beginning, "Sold to you by me," and signed merely, "C." Here the broker renders himself personally liable on the contract, according to the rules which apply to the cases of undisclosed principals, and which are discussed in another part of this book.

4. Where the broker on the face of the notes professes to sign as a broker, though he is really the principal: in which case the broker's signature does not bind the other party—*vide Mollett* v. *Robinson* (1874), 7 H. L. 802.

As brokers have not possession of the goods they obviously cannot have any lien. There is, however, an exception in the case of insurance brokers, who have a general lien on the policy for commission and for premiums

paid and payable by them; it being the custom to leave the policy in their hands—*vide Snook* v. *Davidson* (1809), 2 Camp. 218, and *Mann* v. *Forrester* (1814), 4 Camp. 60.

It seems that a broker has an implied authority to receive payment and give receipts when it is customary in the particular business in which he is employed—*vide Campbell* v. *Hassel* (1816), 1 Stark. 233, and *Jackson* v. *Jacobs* (1837), 5 Scott. 79.

It also seems probable that a broker has an implied authority to sell upon credit, when it is customary to do so in the particular business in which he is employed; but certainly not otherwise.

Wiltshire v. *Sims* (1808), 1 Camp. 257; here it was held that, as stock is usually sold for cash, a stockbroker could not sell it upon credit without having a special authority to do so; for in the absence of special authority an agent can only do an act in the way that is usual in the business in which he is employed.

Papé v. *Westacott* (1894), 1 Q. B. 272, & 10 T. L. R. 51; here it was held that an agent employed to receive money has no implied authority to receive payment on behalf of his principal in any other mode than in cash, in the absence of usage to the contrary.

Auctioneers.—An Auctioneer is a mercantile agent who is employed to sell goods, wares, or merchandise, at a public auction, on behalf of his principal.

An auctioneer has possession of the goods, and an implied authority to sell them in his own name. If he does sell without disclosing the name of his principal, even though he is known to be an agent, he is personally liable, and can himself both sue and be sued upon the contract—*vide Franklyn* v. *Lamond* (1847), 4 C. B. 637.

It seems that an auctioneer has an implied authority to

receive payment in cash, and to give a receipt therefor on behalf of his principal—*vide Sykes* v. *Giles* (1839), 5 M. & W. 645, and *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352.

But he has, apparently, no implied authority to sell on credit, unless he can show some particular custom or usage which allows him to do so—*vide Williams* v. *Millington* (1788), 1 H. Bl. 81.

Neither has he any implied authority to give a warranty —*vide Payne* v. *Lord Leconfield* (1882), 51 L. J. Q. B. 642.

An auctioneer's signature in his sale book at a public auction is a sufficient memorandum to satisfy the Statute of Frauds; for though he is primarily agent of the seller, he becomes also agent for the buyer directly the goods are knocked down—*vide Emmerson* v. *Heelis* (1809), 2 Taunt. 78, *Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333, and *Hinde* v. *Whitehouse* (1806), 7 East. 558.

The signature of the auctioneer's clerk made in the sale book at the auction is not sufficient to satisfy the Statute of Frauds, unless the clerk has been specially authorized to sign by the party to be charged upon the contract: for the auctioneer has no authority implied in law to delegate to his clerk the right to sign the sale book—*vide Bell* v. *Balls* (1897), 13 T. L. R. 274.

Directly the auction is over the auctioneer is the agent of the seller only, and he cannot then bind the buyer by his signature, so as to satisfy the Statute—*vide Mews* v. *Carr* (1856), 1 H. & C. 484, and *Bell* v. *Balls, ubi supra.*

If an auctioneer advertises a sale by auction as taking place on a certain day, and then does not sell, he is not

liable to indemnify those who have been put to expense in attending the sale, as his advertisement is a mere statement of intention, and affords no ground of action—*vide Harris* v. *Nickerson* (1873), L. R. 8 Q. B. 286.

But where a sale by auction is advertised to be "without reserve," then the auctioneer is liable upon a contract to the highest *bonâ fide* bidder, that the goods shall be knocked down to him—*vide Warlow* v. *Harrison* (1858), 1 E. & E. 295.

Commission Agents.—A Commission Agent may be defined as an agent who resides in England and buys or sells goods in England as principal for a correspondent abroad; or who resides abroad, and buys or sells goods abroad as principal for a correspondent in England, charging his correspondent with the price of the goods and a commission for his services. The term commission agent is sometimes used as synonymous with the term factor.

A commission agent is not, strictly speaking, an agent at all, but rather a quasi-vendor, as he does not establish any privity of contract between his employer and a third party.

The distinction between a commission agent and a seller of goods is well laid down in the case of *Ireland* v. *Livingstone* (1872), L. R. 5 H. L. 395; where Blackburn, J., said; "If the consignor is a person who has contracted to supply the goods at an agreed price to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged. . . . Each party there takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, and therefore no commission is charged. But it is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case

he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the actual cost and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature."

But although a foreign commission agent is bound to pay the foreign seller for the goods, and is therefore in the position of a quasi-vendor with regard to his principal, he is nevertheless regarded as an agent, for the purpose of measuring damages as between himself and his principal.

Cassaboglou v. *Gibbs* (1883), 11 Q. B. D. 797. C. A.; here the plaintiff, who was a merchant in London, gave orders to the defendants, who were commission agents in Hong Kong, to buy for him a certain description of opium from merchants out there. No such opium could then be obtained there; but instead of informing the plaintiff of this fact, the defendants negligently informed him they could procure it, and purchased and shipped to him opium which they by mistake thought was such as he had ordered. The plaintiff brought an action against the defendants, and the Court of Appeal held that the relation between plaintiff and defendants, for the purpose of measuring damages, was that of principal and agent, and not that of seller and buyer.

"**Del Credere" Agents.**—A "Del Credere" Agent is a mercantile agent, who, in consideration of a higher commission than usual being paid him, undertakes to indemnify his principal against any loss arising from the non-performance of the contract by the third party; thus a factor acting under a del credere commission, may undertake to pay the price of the goods sold, if the buyer fails to do so.

Bramwell v. *Spiller* (1870), 21 L. T. N.S. 672; here it was decided that an agent acting under a del credere

commission is in the same position with regard to the vendee as any other agent, and cannot sue the vendee in his own name for a debt contracted with him on behalf of a disclosed and named principal.

Partners.—It is very difficult to give a correct and accurate definition of a Partnership proper; but perhaps the following one will do for our present purpose, which defines a partnership as, "A voluntary unincorporated association of individuals standing to one another in the relation of principals for carrying out a joint operation or undertaking for the purposes of a joint profit."

From the fact of the partnership relation, one partner is a general agent for all of the other partners in every matter that falls within the ordinary scope of the partnership business; and the other partners are bound by every act of one partner done within the scope of the apparent authority with which he is invested, even though not within his actual authority, unless it was known to the other contracting party, or by reasonable diligence might have been known, that such partner was not acting within his actual authority.

Baird's case (1870), L. R. 5 Ch. 733; here it was held that as between the partners and the outside public (whatever might be their private arrangements between themselves) every partner was the unlimited agent of every other partner in every matter which was connected with the partnership business, or which was represented by him as being connected with such business, and which was not in its nature beyond the scope of it.

Holme v. *Hammond* (1872), L. R. 7 Ex. 218; here it was held that, whenever a contract of partnership existed between commercial men, each partner was in contemplation of law the agent for each of the others, and for the firm collectively; and that the other partners were bound by any contract which one of them might enter into within the scope of the partnership with reference to the nature

of the undertaking; this agency being an incident of the contract of co-partnership.

Solicitors, Estate Agents, Ship-masters, and Ship-husbands are also mercantile agents, who are severally invested by construction of law with certain implied authority.

CHAPTER III.

RIGHTS OF A PRINCIPAL AGAINST HIS AGENT.

1. A remunerated agent is bound to do the work which he has undertaken for his principal; and is bound to do it with reasonable care, diligence, and skill. The agent is bound to indemnify his principal for any loss or damage which the principal may sustain by reason of the agent's negligence, or other breach of his duty as an agent. And in an action by a principal against his agent for negligence or other breach of duty, the measure of damages is the actual loss sustained by the principal as the natural and probable consequence of such negligence or breach of duty. *Cassaboglou* v. *Gibbs* (1883), 11 Q. B. D. 797. C. A.; here a commission agent at Hong Kong was employed to buy a particular kind of opium by a principal in England. Instead of informing his principal that it could not be procured, he negligently purchased and shipped to him opium which he by mistake thought was such as his principal had ordered. In an action brought by the principal, the Court of Appeal held that the proper measure of damages was the actual loss sustained by the principal in consequence of the opium not being of the description ordered, and not the difference between the value of the description ordered and of that shipped.

A voluntary or gratuitous agent is only liable for negligence in carrying out a work which he has actually

commenced; but he is not bound to enter upon the agency at all, unless he chooses; for when there is no consideration for the agent's promise, there cannot be any binding contract of agency; and though he is liable for any misfeasance in the course of his employment, he cannot be made liable for a mere nonfeasance. If, however, a voluntary agent does enter upon the agency work, he is bound to carry it out with reasonable care, diligence, and skill; it having been decided that the confidence induced by undertaking a service for another is a sufficient consideration to create a duty in the performance of it. But a gratuitous agent is not bound to show the same amount of care, diligence, and skill as a paid agent; for while the latter is liable for ordinary or simple negligence, the gratuitous agent is only liable for gross negligence.

For the above rules, *vide* the following cases:—

Elsee v. *Gatward* (1793), 5 T. R. 143; here it was held that if a party voluntarily undertakes to perform work and proceeds on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertakes, but does not proceed with the work, no action will lie against him for the nonfeasance.

Balfe v. *West* (1853), 13 C. B. 466; here it was held that the steward of a horse-race who had not entered upon the duties of his office could not be liable for mere nonfeasance in omitting to appoint a judge to determine the winner.

Coggs v. *Bernard* (1704), 1 Sm. L. C. 10th ed., 167; here the defendant had undertaken, without any remuneration, to take up several hogsheads of brandy from a certain cellar, and to lay them down safely in another cellar. In the transfer, by the gross negligence of the defendant and his servants, one of the casks got staved in, and a great deal of brandy was lost. The Court held that although the defendant was a gratuitous bailee, he was liable for the damage, on the ground that the confidence induced by

undertaking a service for another is a sufficient legal consideration to create a duty in the performance of it. In this case Powell, J., said; "And this action is founded upon the warranty upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action." And Holt, C.J., said; "And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession."

Wilkinson v. *Coverdale* (1793), 1 Esp. 74; here it was decided that when a party undertakes to procure an insurance policy for another, without consideration; if the party undertaking actually carries his undertaking into effect, but does it so negligently that the other party can derive no benefit from it, then the latter has a right of action against the former.

Shiels v. *Blackburne* (1789), 1 H. Bl. 159; here Lord Loughborough said; "I agree that when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, then the bailee is only liable for gross negligence: but if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

Doorman v. *Jenkins* (1834), 2 A. & E. 256; here Taunton, J., said; "The phrase "gross negligence" means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree."

Beal v. *The South Devon Railway* (1860), 5 H. & N. 875; here Pollock, C.B., said; "From a gratuitous bailee is reasonably expected such care and diligence as persons ordinarily show in their own affairs, and such skill as he

has. From a bailee for hire is reasonably expected such care and diligence as are exercised in the ordinary course of a similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment."

Giblin v. *McMullen* (1868), 2 L. R. P. C. 317; here the Privy Council held that a bank that were gratuitous bailees of certain debentures which had been entrusted to them by a customer, were not bound to exercise more than ordinary care of them, and that the negligence for which alone they would be liable, would be the want of that ordinary care which a reasonably prudent man takes of his own property of the like description.

A barrister is not liable even for gross negligence and want of skill in the exercise of his profession, as his services are purely gratuitous, and honorary.

Fell v. *Brown* (1791), Peake. 96; here it was held that an action would not lie against a barrister for negligently and unskilfully settling and signing a bill filed in Chancery.

Mulligan v. *McDonogh* (1860), 2 L. T. N.S. 163; here it was held that no action would lie against a barrister for negligence and non-attendance at a trial.

2. An agent must never place himself in such a position as tends to cause his own and his employer's interests to conflict.

(*a*) The agent must not turn himself into a principal as against his principal, without the latter's knowledge and consent. Thus, in Story on Agency (9th ed. sect. 211), we find the following proposition: "It is well settled (to illustrate the general rule) that an agent employed to sell cannot himself become the purchaser; and an agent employed to buy cannot himself be the seller."

Sharman v. *Brandt* (1871), L. R. 6 Q. B. 720; here it was laid down that if a man employs a broker to buy

goods for him at a certain price, the broker cannot under such an authority make himself a principal in the contract of sale and purchase.

Mollett v. *Robinson* (1874), L. R. 7 H. L. 802; here the defendant, who was a Liverpool merchant, commissioned the plaintiff as broker to buy certain tallow for him in London; the plaintiff having other commissions to execute (in accordance with a custom of the London tallow market), bought in his own name a larger quantity of tallow than the defendant had ordered, out of which he appropriated to the defendant the amount which the latter had commissioned him to buy. The defendant refused to accept the tallow from the plaintiff; whereupon the plaintiff brought an action against him. The House of Lords held that no action was maintainable against the defendant; seeing that the defendant could not be bound by a custom of the London tallow market, which was of such a nature as to entirely change the character of a broker, and to convert him from an agent to buy for his employer, into a principal to sell to him, unless the defendant was proved to have known of, and assented to, such a custom.

Dunne v. *English* (1874), L. R. 18 Eq. 524; here Jessel, M.R., said; "He (defendant) was not merely a theoretical and legal agent, but he was the active agent for carrying on this sale, and being such agent he was bound, as I understand the law, if he intended to purchase himself, or to take a share in the purchase, to tell the plaintiff (the principal) so, and, as I think, to tell him more than that—to tell him what share in the purchase he intended to take."

(*b*) The agent must always keep proper accounts on behalf of his principal.

White v. *Lady Lincoln* (1803), 8 Ves. 363; here Lord Eldon said; "With reference to those latter characters (those of general agent, auditor, land-steward, and manager)

this Court must for the safety of mankind lay down as a rule, to be departed from only upon very special circumstances, that a man standing in that relation is bound to keep regular accounts of his transactions on behalf of his employer." It was also laid down in this case that if an agent has not kept proper accounts, he cannot charge his principal for his services.

(*c*) The agent must not make any profit in the course of his employment without his principal's consent; and any so made will become the absolute property of his employer.

Morison v. *Thompson* (1874), L. R. 9 Q. B. 480, & 30 L. T. 869; in this case a broker was employed by the plaintiff to buy him a ship called the *Atrato* as cheaply as possible. The vendor had promised to give his broker Scott whatever he obtained over £8500 for the said ship. Scott promised to give the plaintiff's broker (the defendant) a share of the amount paid in excess of £8500. Eventually the defendant bought the ship for the plaintiff for £9250. The Court held that the plaintiff could recover, in an action for money had and received, from the defendant, the amount that the latter had obtained from Scott, viz. £225.

Harrington v. *Victoria Graving Dock Company* (1878), 3 Q. B. D. 549; in this case, the defendants agreed to give the plaintiff, who was in the employment of the Great Eastern Railway Company, a commission of 5 per cent. for superintending repairs which had to be done to two ships belonging to the Great Eastern Railway, in consideration of the plaintiff's promise to use his influence to get the Railway Company to accept the defendants' tender for the repair of the said ships. The Court held that the plaintiff could not recover any commission upon such an agreement, as even if the promise of commission did not as a matter of fact bias the plaintiff, still the tendency of such an agreement was to bias the mind of the agent or other

person employed, and to lead him to act disloyally to his principal.

The Boston Deep Sea Fishing & Ice Company v. *Ansell* (1888), 39 Ch. D. 339. C. A.; in this case the defendant, who was the managing director, at a yearly salary, of the plaintiff company, contracted on its behalf with a ship-building company for the construction of certain fishing smacks, and unknown to the plaintiff company took a commission from the ship-building company upon the contract. The defendant was also a shareholder in an ice company, and a fish-carrying company, which gave bonuses to such of their shareholders as, being owners of fishing smacks, employed the said companies in supplying ice and carrying for them: the defendant employed these companies in respect of the plaintiff company's smacks, and himself received the bonuses. The Court held that the fact of the defendant having taken commission from the ship-building company, justified the plaintiff company for dismissing him from their employment, even though they did not find out till after the dismissal what had taken place. It also held that the defendant must account to the plaintiffs for the commission he had received from the ship-building company, and also for the bonuses he had received from the ice and fish-carrying companies. In giving judgment, Bowen, L.J., said; "There can be no question that an agent employed by a principal or master, to do business with another, who unknown to that principal or master, takes from that person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all: if it is a profit which arises out of the transaction, it belongs to his master

and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it."

Mayor of Salford v. *Lever* (1891), 1 Q. B. 168. C. A.; here it was laid down by the Court of Appeal, that if an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has bribed him, and such contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: (1) He may recover from the agent the amount of the bribe he received. (2) He may also recover from the agent, and the person who has paid the bribe, jointly or severally, damages for any loss he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head.

Shipway v. *Broadwood* (1899), 1 Q. B. 369. C. A.; in this case the defendant purchased a pair of horses from the plaintiff, after having obtained a certificate of soundness from a veterinary surgeon whom he employed to examine them. The defendant found, after delivery, that the horses were unsound, and thereupon stopped the cheque he had sent for the price. In the course of an action brought upon the cheque, it having been proved that the veterinary surgeon had been bribed by the plaintiff, the Court held that it was immaterial to inquire what effect the bribe had upon the mind of the defendant's agent, that it invalidated the certificate of soundness, and that the plaintiff could not recover under the contract, seeing that it depended on the validity of the certificate.

But if a principal employs an agent whom he in fact knows is not to be remunerated by himself, but by the third party; but does not choose to inquire what the amount of the remuneration is, then the principal will be held, by construction of law, to have consented to his

agent receiving from the third party the amount which an agent employed in a similar business usually charges.

The Great Western Insurance Company v. *Cunliffe* (1874), L. R. 9 Ch. 525; here the plaintiffs, who were a Marine Insurance Company in New York, employed the defendant firm in London as their agents for settling claims in England, and for effecting reinsurances. For settling the claims, the defendants were to receive a fixed percentage; but nothing was arranged as to remuneration for the reinsuring. According to the custom as between underwriters and brokers, the defendants were allowed by the underwriters five per cent. on each reinsurance, and also at the end of the year, on the general balance between the underwriter and the broker, twelve per cent. on the profits of the year, if there were any. The defendants habitually received both these percentages, but only mentioned the five per cent. in the accounts sent to the plaintiffs. Though the plaintiffs discovered, in 1866, that the defendants were receiving the twelve per cent. allowance, they made no objection till 1868; but in 1868 they filed a bill in Chancery against the defendants for an account in which the twelve per cent. should be accounted for; and also claiming repayment of certain sums of interest. The Court held that the defendants were rightly entitled to the twelve per cent. allowance, and also to the interest that they had charged. Mellish, L.J., said; "If a person employs another, who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and, in fact, knows that he is to be remunerated, not by him, but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging."

Baring v. *Stanton* (1876), 3 Ch. D. 502. C. A.; here the

Court of Appeal affirmed the rule laid down in *The Great Western Insurance Company* v. *Cunliffe, ubi supra.*

(*d*) The agent must never use information or materials obtained in the course of his employment, to the detriment of his principal—*vide Lamb* v. *Evans* (1893), 1 Ch. 218, & 2 R. 189, and *Robb* v. *Green* (1895), 2 Q. B. 315. C. A., & 11 T. L. R. 517. In the latter case, the plaintiff was the owner of a game farm at Liphook in Hants, and the defendant, who had formerly been manager to the plaintiff, was at the time in question carrying on a similar business near Henley. The defendant, while in the plaintiff's service, had secretly copied from the latter's order-book a list of his customers, which he afterwards used for the purposes of his own business by sending circulars to them. The plaintiff claimed damages and an injunction, which were both granted him; the Court holding that in every contract of service there is an implied obligation on the part of the servant to serve his master honestly and faithfully, and not to abuse his confidence in matters appertaining to such service.

3. An agent is not entitled to delegate his authority, so as to establish the relation of principal and agent between his own principal and a third party, without his principal's authority to do so—"Delegatus non potest delegare."

It seems, however, that where a principal has not expressly authorized his agent to delegate his authority to a sub-agent, that such an authority may nevertheless be implied from the conduct of the parties, from the nature of the particular business, from the usage of a trade or business, or from an unforeseen emergency or necessity.

De Bussche v. *Alt* (1878), 8 Ch. D. 286. C. A., & 47 L. J. Ch. 386; in this case the plaintiff employed Gillman and Company to sell a ship for the minimum price of 90,000

dollars; thereupon, with the plaintiff's consent, Gillman and Company employed the defendant to sell it for them. Defendant, however, bought the ship himself at the minimum price, and then sold it for 160,000 dollars. The Court held that the relationship of principal and agent had been established between the plaintiff and defendant, and that therefore the plaintiff could recover from defendant the balance of 70,000 dollars. Thesiger, L.J., delivering the judgment of the Court of Appeal, said; "As a general rule, no doubt, the maxim, 'Delegatus non potest delegare' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analyzed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfil; and that inasmuch as confidence in the particular person employed is at the root of the agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do, from time to time, render necessary the carrying out of instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case the reason of the thing requires that the rule should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a sub-agent, or substitute; and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied, where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise

which imposed upon the agent the necessity of employing a substitute; and that when such authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."

Where an agent is authorized to employ a sub-agent and to create privity of contract between him and his principal, the agent will not be liable for the negligence or misconduct of the sub-agent employed by him, so long as he has used reasonable care and diligence in choosing such sub-agent. Thus we find it laid down in Story on Agency (9th ed., sect. 201); "The agent will not ordinarily be responsible for the negligence or misconduct of the sub-agent, if the employment of the sub-agent is authorized by the principal either expressly, or impliedly, by the usage of a trade, or the usual dealings between himself and his principal, and he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. The same rule will apply where the employment, although not so authorized, arises from unforeseen exigencies or emergencies, imposing upon the agent the necessity of employing a sub-agent. But the sub-agent will, under such circumstances, be himself directly responsible to the principal for his own negligence or misconduct; for wherever any such express or implied authority to appoint a sub-agent is allowed or given by the principal, a privity is created between them. Under other circumstances, as no privity would exist between them, the sub-agent would be directly responsible only to his immediate employer, the original agent."

Whenever an agent employs a sub-agent for his own convenience, and without the authority of his principal,

there is of course no privity of contract between the principal and the sub-agent, and the original agent remains solely liable to the principal.

Cobb v. *Becke* (1845), 6 Q. B. 930; here it was laid down that, as a general rule, there is no privity of contract between the London agent of a country solicitor and the client in the country; and that the former therefore cannot maintain an action against the latter for his fees, nor the latter against the former for negligence. The "ratio decidendi" in this case was affirmed in *Robbins* v. *Fennell* (1847), 11 Q. B. 248.

In re Mutual Aid Permanent Benefit Building Society, Ex parte James (1883), 48 J. P. 54, & 49 L. T. 530; here the secretary of a benefit building society employed his own private clerk, who was not an officer of the society, to transact certain business of the society. The directors had at various times drawn cheques which were, by the directions of the secretary, given over to his clerk for the purpose of being paid by him to the withdrawing members; but instead of being so applied, they were misappropriated by the said clerk. The Court held that the secretary was liable for the acts of his clerk.

Skinner v. *Weguelin* (1882), 1 C. & E. 12; here an agent, who had been employed by the plaintiff to collect certain sums of money due to the said plaintiff, was held to be liable to his principal for all the monies that had been received by a sub-agent whom he had employed, even though such sub-agent had been employed with the knowledge of the principal.

CHAPTER IV.

RIGHTS OF AN AGENT AGAINST HIS PRINCIPAL.

1. A principal is bound to remunerate his agent, unless it has been specially agreed between them that the agency is to be gratuitous. Mercantile agents are, generally, remunerated by a commission, which depends upon the value of the work done by them.

When the amount of the remuneration has not been expressly agreed upon, then the agent is entitled to such remuneration as is reasonable, having regard to all the circumstances of the particular case.

But an agent is not entitled to any remuneration in respect of a transaction which is in itself illegal—*vide Josephs* v. *Pebrer* (1825), 3 B. & C. 639.

Where, however, an agent makes a contract for his principal which is not in itself illegal, but only illegal if carried out in a certain way, he is entitled to his remuneration.

Haines v *Busk* (1814), 5 Taunt. 521; here it was held that it is no answer to an action by a broker for commission for procuring freight, that the charter-party procured was such, that if the charterer failed to obtain certain licences, the voyage would be illegal.

If a contract made by an agent relates to gaming or wagering, then, though the contract is not illegal, but

merely void, the agent cannot recover any remuneration, owing to the provisions of 55 Vict. c. 9, s. 1 (Gaming Act, 1892).

If an agent is guilty of wilful misconduct or negligence in the course of his employment, whereby his principal fails to derive any benefit from his services, then he forfeits his right to any remuneration; and, moreover, is liable to his principal for any loss that the latter may have sustained thereby—*vide Hamond* v. *Holiday* (1824), 1 Car. & P. 384, and *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210.

Where no time has been fixed for the completion of the work which an agent has been employed to do, then, in order to entitle him to his remuneration, he must execute it within a reasonable time—*vide Houghton* v. *Orgar* (1884), 1 T. L. R. 653.

If a remunerated agent does anything for his principal which comes within the terms of his agency, then, however uncompensated it may seem to him personally, he is not entitled either to charge for it in his account, or to secretly take any remuneration for it—*vide Williamson* v. *Hine* (1891), 1 Ch. 390.

In order to entitle an agent to his remuneration, he must prove that the business which he was employed to effect was in fact really effected through his introduction or agency. In other words, the agent must prove that he was the "causa causans" of the business effected between his principal and the third party; that it was brought about by him directly, and was not merely the indirect or remote consequence of his agency.

Green v. *Bartlett* (1863), 14 C. B. N.S. 681, & 8 L. T. 503; here the plaintiff, who was an auctioneer, was employed by defendant to sell for him, Herm, one of the Channel Islands, upon the terms that the plaintiff should be paid a 2½ per cent. commission upon the amount obtained by such

sale. The plaintiff advertised the property, and put it up to auction, but without succeeding in finding a purchaser. The property, however, was soon afterwards sold privately by defendant himself to a person who had attended the auction in consequence of seeing plaintiff's advertisement, and who had obtained from the plaintiff the name of the owner. During his negotiations with the purchaser, and before completing the sale to him, the defendant revoked the plaintiff's authority to sell the property. The Court held that the plaintiff was entitled to the commission which the defendant had agreed to pay him on the sale of the property, seeing that the plaintiff had been the "causa causans" of the sale, although the actual sale had not been effected by him.

Antrobus v. *Wickens* (1865), 4 F. & F. 291; here Cockburn, C.J., said; "Commission is not due merely because in some way or other the loan followed casually, indirectly, and as a remote consequence. It must appear that the advance was obtained by or through their agency."

Lofts v. *Bourke* (1884), 1 T. L. R. 58; here Stephen, J., giving judgment for the defendant, said; "I am of opinion that the plaintiffs (the agents) have failed to prove that they have done anything which could be considered to have materially caused the purchaser to buy the defendant's house."

Lumley v. *Nicholson* (1886), 34 W. R. 716; here the defendant employed the plaintiff to sell an estate for him upon the terms that he should be paid a certain commission upon the amount obtained by such sale. The estate was divided into lots, some of which were purchased by one Armitage, and the plaintiff got his commission on those lots. Defendant then revoked plaintiff's authority, and subsequently Armitage bought the remaining lots from defendant by private contract. The Court held that the jury were entitled to find for the defendant, on the ground that the ultimate sale was not due to the plaintiff's introduction.

Toulmin v. *Millar* (1887), 58 L. T. N.S. 96, & 3 T. L. R. 836; here the question was, whether the plaintiff, an estate agent, who had been employed by an owner of land to let his estate for him, and who had done so, was entitled to commission upon the sale of the said estate, which was subsequently bought by the tenant found by the plaintiff, but without any further communications with him (plaintiff). The House of Lords, reversing the judgment of the Court of Appeal, held that the plaintiff was not entitled to any commission upon the sale. And Lord Watson, in giving judgment, said: "It is impossible to affirm in general terms that A is entitled to a commission if he can prove that he introduced to B the person who afterwards purchased B's estate, and that his introduction became the cause of the sale. In order to found a legal claim for commission, there must not only be a causal, there must also be a contractual relation between the introduction and the ultimate transaction of sale. If A (the agent) had no employment to sell, express or implied, he could have no claim to be remunerated."

Bayley & others v. *Chadwick* (1878), 36 L. T. N.S. 740; here the plaintiffs, who were ship-auctioneers, were employed by defendant to sell by auction the steamship Bessemer: it was agreed that if the ship was not sold by auction, but a sale was subsequently effected to any one introduced by the plaintiffs, or "led to make such offer in consequence of their mention or publication for auction purposes," the plaintiffs should receive 1 per cent. on the purchase money. The ship was not sold by auction, but was ultimately bought by a person who had not seen the advertisement, though he undoubtedly made his offer through having heard of such advertisement. The Court of Common Pleas, whose judgment was affirmed by the House of Lords, held that it was not necessary, in order to entitle the plaintiffs to recover commission, for the purchaser or his agent themselves to have seen the publication,

as the words "in consequence of" included indirect as well as direct consequence; and that the question for the jury was whether the purchaser had been induced to make his offer by "the publication for auction purposes."

Where an agent has carried out his part of the business, but the business, through no default of his, is not completed, he (the agent) is nevertheless entitled to his full commission.

Green v. *Lucas* (1876), 33 L. T. 584. C. A.; here an agent was employed to borrow money upon a leasehold security: he found a person able and willing to lend the money; but the negotiations went off by reason of such person discovering unusual covenants, which the agent had not been informed of by his principal. The Court held that the agent was entitled to the full commission agreed upon for procuring the loan.

Fisher v. *Drewett* (1878), 48 L. J. Ex. 32; here the defendant agreed with the plaintiff, that if the plaintiff procured him a loan of £2000 or such other sum as he should accept, that he would pay him a commission of $2\frac{1}{2}$ per cent. on the money received. The plaintiff found a person able and willing to lend £1625, if the defendant showed a good title to his security: the defendant accepted the offer, but failed to show a good title to his security, and therefore no money was received by him. The Court of Appeal held that, as it was owing to the defendant's own default that he had not received the money, the plaintiff was entitled to his full commission upon the £1625. In giving judgment, Bramwell, L.J., said; "The current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced. And it is reasonable that it should be so."

Grogan v. *Smith* (1890), 7 T. L. R. 132. C. A.; here the owner of a house in London employed the plaintiff to find him a purchaser for it: the plaintiff found a person who offered a certain sum for it, upon certain terms. A negotiation ensued by letter, in which there were various proposals and counter-proposals, but in the end the negotiation went off, and there was no sale. The Court of Appeal held that the plaintiff was not entitled to his commission; and laid down that to entitle the plaintiff to his commission he must be able to show that he had found a person able and willing to buy, and that the vendor and purchaser were really agreed as to all the terms of the contract, and that it was only prevented from becoming a binding contract by reason of the default of the defendant in refusing to make the agreement valid and binding.

Fuller v. *Eames* (1892), 8 T. L. R. 278; here an agent who was employed to procure a loan, brought the principals together; but before it was completed the negotiations were broken off for reasons beyond the control of the agent. The Court held that the agent was entitled to his commission. Smith, J., said; "If the person proposing to negotiate a loan brings the principals together, and if nothing remains for him to do, he is entitled to his full commission."

Nosotti v. *Auerbach* (1898), 79 L. T. 413; here the plaintiff was instructed by defendant to find a purchaser for his house for £4000. On January 16 he found one T., ready and willing to pay that sum; but who required possession on March 15. The defendant refused the offer on the ground that he could not give up possession on March 15. The Court held that the plaintiff was entitled to his commission; seeing that when all the terms of an agreement are stated, except the term as to the time when it is to be carried out, as to which there is no express stipulation, then it is an implied term that the agreement is to be performed within a reasonable time.

It seems that where no limit has been fixed to the time during which an agent is to receive commission upon orders obtained through his introductions, he will be entitled to receive his commission, even after the determination of his agency, upon all orders from customers introduced by him during his agency.

Salomon v. *Brownfield* (1896), 12 T. L. R. 239; here the defendants, who were pottery manufacturers, agreed to employ the plaintiff as their agent to obtain them customers and orders for their goods in Australia. The plaintiff was to receive 7½ per cent. upon the net amount of cash received in payment of goods, orders for which were obtained through him; and also 7½ per cent. upon all orders from customers introduced by him, on payment being made by them, whether such orders were obtained through plaintiff's representations or not. Upon February 6, 1895, the defendants gave plaintiff three months' notice to terminate his employment: he, however, made a claim to be paid commission upon all orders from customers in Australia introduced by him, as the contract was indefinite as to time. The Court held that the reason why no period was put to the duration of the contract was that it was intended that payment should be made upon all orders received from customers introduced by the plaintiff: that it was open to the defendants to cease dealing with the customers introduced by him if they chose; and that therefore, the plaintiff was entitled to the commission claimed.

As a general rule an agent is not entitled to recover any remuneration, upon a "Quantum Meruit," for work done, unless the business which he has been employed to transact has been completed—*vide* Story on Agency (9th ed., sect. 329), and also the following cases:—

Dalton v. *Irwin* (1830), 4 C. & P. 289; here it was held that where a broker is employed by a shipowner to procure a charter party, if the negotiation goes off on

account of the broker's default, he cannot recover any remuneration; nor can he in such a case recover anything for expenses which he may have been put to, unless such expenses are unusual and have been incurred in consequence of the shipowner having urged him to extraordinary expedition in the matter.

Barnett v. *Isaacson* (1887), 4 T. L. R. 645; here the defendant promised by letter that he would pay the plaintiff a commission of £5000 if he would introduce him to some person who would purchase his business: the plaintiff failed to find a purchaser, and so he introduced the defendant to an accountant who he thought might be able to effect what he (the plaintiff) had failed to do. The accountant subsequently bought the business himself; whereupon the plaintiff sued the defendant, to recover some remuneration for his introduction; but the Court of Appeal held that he was not entitled to recover anything. In giving judgment, Esher, M.R., said; "To entitle a plaintiff to sue upon a "quantum meruit," the rule is, that if the plaintiff relied upon the acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if he (the defendant) accepted what had been done it was on the terms that he must pay for it. The acceptance of the introduction here did not take place under such circumstances that the defendant must pay for it. Neither party ever thought that it was to be paid for."

But of course an agent may be entitled to recover upon a "quantum meruit," by reason of express or implied agreement, or in cases where the principal himself revokes the authority.

Simpson v. *Lamb* (1856), 17 C. B. 603, & 25 L. J. C. P. 113; here it was held that it was not competent for a principal to revoke the authority of his agent without paying for labour and expense incurred by him in the

course of his employment; and that the right of the agent to be reimbursed depended on the terms of the agreement. A general employment might carry with it a power of revocation on payment only of a compensation for what had been done under it; but that there might be a qualified employment under which no payment could be demanded if the authority was revoked.

Farthing v. *Tonkins* (1893), 9 T. L. R. 566; here an architect had been employed to make plans and specifications for a certain building which it was proposed to erect; but which, ultimately, though through no fault of the architect, it was decided not to erect. The Court held that the architect was not entitled to charge commission on the estimated cost of the building; but that he was entitled to a reasonable remuneration for the plans and specifications.

Whenever there is an express contract which makes no provision for the recovery of remuneration upon a "quantum meruit," the agent cannot recover upon an implied contract.

Lott v. *Outhwaite* (1893), 10 T. L. R. 76. C. A.; here Lindley, L.J., said; "It was said that there was an implied contract to pay the agent a "quantum meruit" for his services. The answer was that there could be no implied contract when there was an express contract."

2. A principal is bound to indemnify his agent for loss or damage incurred by the latter in transacting the agency business.

Adamson v. *Jarvis* (1827), 4 Bing. 66; here it was laid down that every one who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for every act which would be lawful, if the employer had the authority which he pretends to have.

If a principal directs his agent to undertake any work

for him, in doing which liabilities are incurred by a particular custom of any trade, business, or locality, the agent has a right (arising out of a contract implied in law) to be indemnified against them by the principal.

Whitehead v. *Izod* (1867), L. R. 2 C. P. 228; here Willes, J., said; "It is familiar law that a principal who employs an agent to purchase goods for him in a particular market is taken to be cognisant of, and is bound by, the rules in force therein; and the agent is entitled to be indemnified for all he does in accordance with those rules."

Campbell v. *Larkworthy* (1893), 9 T. L. R. 528; here a person going to Australia agreed to deliver an ice machine to persons to whom his principal had sold it for shares in a company, and also agreed to take the certificate of the said shares in his own name, and so to become a shareholder; he moreover agreed to retain the certificate to hand over to his principal. The agent did what he had agreed to do; and subsequently a call having been made upon the shares, he, as the registered holder of them, was bound to pay up. The Court held that his principal was bound to indemnify him.

There are, however, the following limitations to an agent's right of indemnity:—

(*a*) If a particular custom of any trade, business, or locality, through which any liability is incurred by an agent, is not so general and notorious that all persons dealing in that trade, business, or locality could easily ascertain it, then knowledge of and assent to it on the part of the principal, will not be implied in law; but will in such a case have to be proved, to entitle the agent to an indemnity from his principal.

Grissell v. *Bristowe* (1868), L. R. 3 C. P. 112; here Bovill, C.J., said; "Where such a custom or usage is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and

notorious that persons dealing in the market could easily ascertain it, and must be presumed to have been aware of it."

(*b*) If a particular custom of any trade, business, or locality through which any liability is incurred by an agent is an unreasonable one, such as a custom of the Stock Exchange to hold a contract binding which is not binding in law, knowledge of and assent to such a custom on the part of the principal will not be implied in law, but will have to be proved, to entitle the agent to an indemnity.

Neilson v. *James* (1882), 9 Q. B. D. 546. C. A.; in this case the Court held that a person could not be bound by a custom of the Stock Exchange to ignore the provisions of Leeman's Act (30 & 31 Vict. c. 29), when he was ignorant of such a custom; seeing that such a custom was an unreasonable one. In giving judgment, Brett, L.J., said; "I think, however, that the plaintiff is only bound by such a custom as is both reasonable and legal, for to that extent only, can a person who is ignorant of a custom be assumed to acquiesce in and be bound by it. Now, the contract for sale which the defendant made did not comply with the terms of the Act (30 & 31 Vict. c. 29), and was therefore illegal and void." [The word "illegal," as here used by Brett, L.J., means merely "not in accordance with the provisions of the Act;" *vide* the judgment of Baggalay, L.J., in the case of *Perry* v. *Barnett* (1885), 15 Q. B. D. 388. C. A.]

Seymour v. *Bridge* (1885), 14 Q. B. D. 460; here the plaintiffs, who were stockbrokers, were employed by the defendant to buy him certain shares in a joint-stock banking company. Plaintiffs purchased the shares, and sent defendant the usual contract note, which did not specify the registered number of the shares, as it is required to do by Leeman's Act (30 & 31 Vict. c. 29), it being the custom on the Stock Exchange to ignore that Act. Before settling

day the defendant wrote to the plaintiffs repudiating the contract on the ground of it not being in accordance with the provisions of the Act. The plaintiffs, however, executed the contract and paid for the shares themselves, in order to avoid being declared defaulters on the Stock Exchange. The Court held that as the defendant knew, or might have known, at the time when he gave the authority, of the custom to ignore the Act, he could not revoke his authority after the brokers had incurred the liability, and that the plaintiffs were entitled to recover the price of the shares from him.

Perry v. *Barnett* (1885), 15 Q. B. D. 388. C. A.; here the defendant instructed the plaintiffs, who were stock-brokers at Bristol, to buy him certain shares in a joint-stock banking company, which they accordingly did. Before settling day the defendant repudiated the contract, on the ground that it was void, as the contract note did not specify the registered number of the shares in accordance with Leeman's Act. The Court held that the plaintiffs were not entitled to recover the price of the shares from the defendant, inasmuch as the custom of the Stock Exchange to ignore Leeman's Act was an unreasonable one, and was not known to the defendant at the time when he instructed the plaintiffs to buy the shares.

Coates v. *Pacey* (1892), 8 T. L. R. 474. C. A.; here the defendant instructed her stockbrokers to buy her certain bank shares, which they did. When the defendant found that the contract had not been carried out in accordance with the provisions of Leeman's Act, she repudiated it on the ground that it was void. The Court held that the plaintiffs could not recover the price of the shares (which, in compliance with the rules of the Stock Exchange, they had been obliged to pay for themselves), seeing that the custom of the Stock Exchange to ignore Leeman's Act was an unreasonable one, and unknown to the defendant.

Smith v. *Reynolds* (1892), 8 T. L. R. 391. C. A.; here

the defendant instructed the plaintiff, a stockbroker, to sell certain shares on the Stock Exchange for him. The plaintiff did so, and though the transfer of the said shares was a forged one, became personally liable to the purchasing broker, in accordance with the rules of the Stock Exchange. The Court held that the plaintiff was entitled to be indemnified by the defendant upon the transaction. Esher, M.R., said; "Any one instructing a broker to buy or sell shares on the Stock Exchange is liable to indemnify the broker for any liability incurred by him in carrying out his instructions by reason of the rules of the Stock Exchange, so long as those rules are reasonable. That principle applies to all markets."

(*c*) If the loss or damage is incurred through the default of the agent himself, he loses his right to be indemnified.

Duncan v. *Hill* (1873), L. R. 8 Ex. 242; here the Court held that there could be no implied promise by a principal to his agent to indemnify him against loss or damage which he had sustained by reason of his own default, and not by reason of his having entered into the contracts into which he was authorized to enter by his principal.

Ellis v. *Pond* (1898), 1 Q. B. 426. C. A.; here it was held by the Court of Appeal that the plaintiff, a stockbroker, could not maintain an action for indemnity against the defendant, his principal, when the loss in respect of which he sought to be indemnified had arisen not through any breach of contract by the defendant, but through the wrongful sale of certain stock by the plaintiff.

(*d*) If the loss or damage is incurred upon a transaction which is illegal, the agent loses his right to be indemnified.

Thacker v. *Hardy* (1878), 4 Q. B. D. 685, & 48 L. J. Q. B. 289; here Lindley, J., said; "Upon general principles an agent is entitled to an indemnity from his principal

against liabilities incurred by the agent in executing the orders of his principal, unless those orders are illegal, or unless the liabilities are incurred in respect of some illegal conduct of the agent himself, or by reason of his default."

But though it is an established rule of law that joint tort-feasors cannot have any redress or contribution against each other, still an agent will be entitled to an indemnity from his principal where he suffers damage from innocently doing an illegal act which is not illegal in itself, but merely illegal because the principal has not the authority he pretends to have—*vide Merryweather* v. *Nixon* (1799), 8 T. R. 186, and *Dugdale* v. *Lovering* (1875), L. R. 10 C. P. 196.

It is now necessary to consider whether an agent who has been employed by his principal to carry out a gaming or wagering transaction can claim to be indemnified by the principal against any loss or damage which he (the agent) may have sustained by reason of that transaction; or whether, on the ground of the illegality of such a transaction, the agent forfeits his right of indemnity. At Common Law, gaming or wagering contracts were not illegal, but were perfectly valid and enforceable, excepting in those cases where they were considered by the Courts to be of such a nature as to be contrary to public policy; *e.g.* a wager upon the duration of the life of Napoleon Buonaparte was held to be void and unenforceable, as tending to bring about the assassination of a foreign sovereign—*vide Gilbert* v. *Sykes* (1812), 16 East. 150.

But from time to time various statutes have been passed with the object of discouraging and putting down wagers.

Thus, 16 Car. II. c. 7, provided, that any sum of money exceeding £100 lost in playing at any game or pastime, or in betting on the players, should be irrecoverable, and

that every kind of security given for money so lost should be void.

9 Anne c. 14 further provided that securities of every kind given for any sum of money lost in playing at any game or pastime, or in betting on the players, or knowingly advanced for such purposes, should be void; and that the loser of £10 or upwards might recover it back, if paid, by action of debt brought within three months of payment.

5 & 6 Will. IV. c. 41 repealed 9 Anne c. 14 so far as it avoided securities, and provided instead, that the securities specified in that Act should henceforth be deemed to have been originally given upon an illegal consideration.

These three statutes, it will be observed, dealt only with wagers of a purely sporting nature, and with the securities given in respect of such wagers.

We now come to the Gaming Act of 1845 (8 & 9 Vict. c. 109), the 18th section of which provides: "That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plates, prizes, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

This Act repeals the statutes of Charles and Anne referred to above; but leaves in force the provision of 5 & 6 Will IV. c. 41, regarding securities given for money lost over sporting wagers.

The effect of section 18 of the Gaming Act, 1845, may be summarized as follows:—

(*a*) It renders wagering contracts of every kind void and unenforceable, but does not render them illegal, in the sense of being prohibited by the law.

Fitch v. *Jones* (1855), 5 E. & B. 238; this action was brought by the indorsee of a promissory note given in payment of a bet on the amount of the hop duty. Lord Campbell, C.J., said; "The note was given to secure payment of a wagering contract, which even before 8 & 9 Vict. c. 109, the law would not enforce; [In a previous case it had been decided that a wager on the amount of the hop duty was unenforceable, as being against public policy] but it was not illegal. There is no penalty attached to such a wager; it is not in violation of any statute, nor of the Common Law, but it is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all."

Bridger v. *Savage* (1885), 15 Q. B. D. 363; here the defendant, who was a commission agent, made a horse-racing bet on behalf of his principal, the plaintiff; the defendant won the bet, and received the money, but refused to hand it over to his principal; who therefore brought this action to recover it. The Court held that the original betting contract was merely void under 8 & 9 Vict. c. 109, s. 18, and not illegal; and that therefore the plaintiff was entitled to recover the money which had been paid to the defendant, as being money had and received to the plaintiff's use.

Read v. *Anderson* (1882), 10 Q. B. D. 100; here Hawkins, J., said; "The object of 8 & 9 Vict. c. 109, was not to render illegal wagers which up to that time had been lawful, but simply to make the law no longer available for their enforcement, leaving the parties to them to pay them or not, as their sense of honour might dictate."

Strachan v. *Universal Stock Exchange* (1895), 12 T. L. R. 38; here Smith, L.J., said; "As was well pointed out by Justice Lush in *Haigh* v. *Town Council of Sheffield* (1874),

L. R. 10 Q. B. 102, a wager is made by statute a thing of a neutral character. It is not forbidden; it leaves an ordinary betting debt a mere debt of honour, depriving it of all legal obligation, but not making it illegal."

(*b*) Seeing that it merely renders wagering contracts void and unenforceable, it does not take away an agent's right to be indemnified for any loss or damage he may have incurred in carrying out a wagering contract.

Read v. *Anderson* (1884), 13 Q. B. D. 779; in this case the plaintiff, a turf commission agent and a member of Tattersall's, was employed by the defendant to make a bet on a horse-race for him. After the bet had been made and lost, the defendant ordered the plaintiff not to pay it; the plaintiff, however, did pay it in order to avoid being posted as a defaulter at Tattersall's, and sued the defendant for the amount he had paid. The Court of Appeal (affirming the judgment of Hawkins, J. (1882), 10 Q. B. 100) held that the plaintiff was entitled to recover, on the ground that the principal had impliedly bargained not to revoke the authority to pay, but to indemnify the agent for acting in the ordinary course of his business. Though a betting contract was void and could not be legally enforced, by a usage of the plaintiff's business known to both parties at the time the contract of employment was made the plaintiff became morally obliged to pay the bet. Bowen, L.J., in delivering judgment, said; "It seems to me that it was well understood to be part of the bargain that the principal should recoup his agent, and should not revoke the authority to pay, but should indemnify the agent against all payments made in the regular course of business. I feel the force of the point that the obligation to pay a lost bet is not recognized by law; but the plaintiff has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue

in the ordinary course of his business from the step which he had taken."

(*c*) It does prevent a principal from recovering from his agent any money or valuable thing which the latter has received for his principal, on account of a wagering transaction—*vide Bridger* v. *Savage, ubi supra.*

(*d*) It does prevent a principal from maintaining an action against his agent to recover any money or valuable thing which the principal would have won if the agent had made such a wagering contract on the principal's behalf as he had agreed to do.

Cohen v. *Kittel* (1889), 22 Q. B. D. 680; here the plaintiff sued the defendant for money which he would have won if defendant had made certain bets on horse-races which he was employed to make. The Court held that the plaintiff could not recover, as the bets, even if made, would not have created any legal rights between the principal and a third party.

(*e*) It does not prevent a person from recovering any money, or valuable thing, which he has deposited to abide the event of a wager, at any time before it has been appropriated to that wager.

Hampden v. *Walsh* (1876), 1 Q. B. D. 189; in this case the plaintiff deposited the sum of £500 with the defendant to abide the event of a bet which he had made with a third party to the effect that the earth was flat: the plaintiff having lost the bet, before the money was paid over to the winner, reclaimed it from the defendant, who, however, paid it over to the winner. The Court held that, notwithstanding the provision of 8 & 9 Vict. c. 109, s. 18, as the plaintiff had demanded his deposit back from the defendant before he had paid it over to the winner the plaintiff was entitled to recover the amount of the deposit from the defendant.

Reggio v. *Steven & Company* (1888), 4 T. L. R. 326; here it was decided that, though the customer of an outside broker cannot, by reason of the provisions of 8 & 9 Vict. c. 109, s. 18, recover his winnings when he wins his wager, he can, when he wins, recover the money which he has deposited as "cover."

Strachan v. *Universal Stock Exchange* (1895), 2 Q. B. 329. C. A. (affirmed in the House of Lords (1896), App. Cas. 166); here the plaintiff had deposited with the defendants, who were outside brokers with whom he was engaged in gaming transactions in stocks and shares, a sum of money and certain securities. The plaintiff having lost the wager sought to recover the money and securities. The Court held that, in the case of a contract for the sale and purchase of stocks made between an outside broker and his customer, if both parties to the contract really intend that no stocks shall be delivered and that "differences" only shall be accounted for, the mere fact that the contract provides that either party may require completion of the purchase, and delivery or receipt (as the case may be) of the stocks, does not prevent it from being a contract by way of gaming and wagering within 8 & 9 Vict. c. 109, s. 18, and therefore null and void. But that the customer who had lost to the outside broker upon a wagering contract of this nature was entitled to recover whatever he had deposited with the latter as security; seeing that 8 & 9 Vict. c. 109, s. 18, only applies to money or valuable things deposited as the stake to abide the event of the wager, and not to money or valuable things deposited as security for the observance by the loser of the terms of a wagering contract; and, moreover, even if securities came within the provision of the statute, the authority to retain them might be revoked at any time before the holder had appropriated them to the contract.

In re Cronmire, Ex parte Waud (1898), 2 Q. B. 383. C. A., & 14 T. L. R. 377; in this case the Court of Appeal followed

the decision of *Strachan* v. *Universal Stock Exchange, ubi supra.* In giving judgment, Smith, L.J., said; "'Cover' is money deposited by a customer with a broker to secure the latter against loss in the event of the stock falling. As Lord Herschell said in *Strachan* v. *Universal Stock Exchange* (1896), App. Cas. 166, the security deposited was deposited as security against a debt which might arise from a gambling transaction; and it was not deposited to abide the event of a wager."

Strachan v. *Universal Stock Exchange* (1895), 12 T. L. R. 38. C. A.; this was another appeal arising out of the same case. Here the plaintiff sought to recover the money which he had deposited with the defendants. The Court of Appeal held that the plaintiff could not recover the money which he had deposited, seeing that the defendants had appropriated the money towards plaintiff's losses, before he had revoked the authority which he had given them to do so.

We must now consider to what extent the Gaming Act of 1845, and the cases decided under it, are affected by the later Gaming Act of 1892 (55 Vict. c. 9), section 1 of which Act provides as follows:—

"Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

It is clear that the effect of this section is to overrule the case of *Read* v. *Anderson* mentioned at p. 67, *ante*; and to take away the right, which an agent previously had, to

be indemnified by his principal against any loss or damage which he may have sustained in the course of any wagering transaction in which he has been engaged on his principal's behalf.

Tatam v. *Reeve* (1893), 1 Q. B. 44; in this case the defendant wrote a letter to the plaintiff asking him to settle certain accounts for him amounting in all to £148; the plaintiff did as he was requested to do, and brought this action to recover the sums paid: the sums were, in fact, due for bets which the defendant had made and lost. The Divisional Court, apparently inferring from the affidavits that the plaintiff knew how the accounts had arisen, decided that the plaintiff could not recover the sums paid, seeing that he paid the money in respect of a contract null and void under 8 & 9 Vict. c. 109; wherefore the Gaming Act of 1892 applied.

The Gaming Act of 1892, however, does not take away an agent's right to an indemnity in respect of the so-called "agreements to pay differences" on the Stock Exchange; for it has been clearly laid down that such agreements are not wagering contracts within the provision of 8 & 9 Vict. c. 109, s. 18.

Thacker v. *Hardy* (1878), 4 Q. B. D. 685, & 48 L. J. Q. B. 289; here the plaintiff, a stockbroker, was employed by the defendant to speculate for him on the Stock Exchange; the plaintiff knew that defendant did not purpose to take up the stock bought for him, or to deliver the stock sold for him, but expected the plaintiff to so arrange matters that he (defendant) should only have to pay "differences": the plaintiff, moreover, knew that unless he arranged matters as defendant expected, he would be unable to meet the engagements which plaintiff entered into on his behalf. The plaintiff having rendered himself personally liable upon the contracts entered into on defendant's behalf, sued the defendant

for an indemnity against the liability incurred by him, and for a broker's commission. Lindley, J., whose judgment was affirmed in the Court of Appeal, held that the plaintiff was entitled to recover, seeing that the transaction upon which the claim was based was not a real "time bargain," or "agreement to pay differences," and therefore not a wagering contract within the provision of 8 & 9 Vict. c. 109, s. 18. In giving judgment, Lindley, J., said; "A real "time bargain" is, I suspect, a very rare occurrence: *Grizewood* v. *Blane* (1851), 11 C. B. 526, affords an instance of one, and *Cooper* v. *Neil* (1878), W. N. 128, as understood by the jury, affords another. But what are called "time bargains" are in fact the result of two distinct and perfectly legal bargains; namely, first a bargain to buy or sell; and, secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bargain is entered into upon the understanding that it is not to be carried out, that a "time bargain" in the sense of an unenforceable bargain is entered into."

It seems from the evidence given in this case, and also from an affidavit sworn by some of the leading members of the Stock Exchange in the later case of *In re Plumbly, Ex parte Grant* (1880), 13 Ch. D. 667, that real "time bargains," or "agreements to pay differences," are unknown upon the Stock Exchange; and it therefore appears that the findings of the juries in the cases of *Grizewood* v. *Blane, ubi supra*, and *Cooper* v. *Neil, ubi supra*, were incorrect, they misunderstanding the evidence brought before them.

We find the following statement in the affidavit sworn in the case of *In re Plumbly, ubi supra:* "Contracts on the Stock Exchange are never for payment or receipt of "differences." All contracts, bargains, and transactions on the Stock Exchange are real transactions for cash, or for a day named, contemplating and compelling the actual transfer or delivery, and the paying for stocks or shares the subject

thereof; which transfer or delivery and payment can only be avoided and rendered unnecessary by a new and equally real bargain, on the one part to accept and pay for on the same day, and on the other part to transfer or deliver an equivalent amount of the same stocks or shares."

But though real "agreements to pay differences" are unknown and impossible on the Stock Exchange, they are very common in the so-called "bucket shops," kept by outside brokers. These brokers are themselves the real principals in these wagering transactions, which are absolutely null and void as coming within the provision of 8 & 9 Vict. c. 109, s. 18—*vide* the cases of *Reggio* v. *Steven & Company*, and *Strachan* v. *Universal Stock Exchange*, at p. 69, *ante;* also *In re Gieve* (1899), 1 Q. B. 784. C. A., & 17 T. L. R. 251.

The Gaming Act of 1892 does not in any way affect the decision in *Bridger* v. *Savage* (1885), 15 Q. B. D. 363, which still remains good law, as is shown by the two following cases:—

De Mattos v. *Benjamin* (1894), 10 T. L. R. 221; here the plaintiff employed the defendant, as his agent, to make bets for him. The defendant subsequently furnished the plaintiff with an account showing a balance due to plaintiff of £15 2*s.* 8*d.* The defendant having received, but having failed to pay over to the plaintiff, any of that money, the latter brought an action against him to recover it. The Court held that the plaintiff was entitled to recover the amount claimed.

Harvey v. *Hart* (1894), W. N. 72; here the defendant had received money as plaintiff's agent for the purpose of carrying out certain betting transactions on his (plaintiff's) account. Stirling, J., held, on the authority of *De Mattos* v. *Benjamin*, *ubi supra*, that plaintiff was entitled to have an account taken of what was due to him from defendant,

and that defendant must pay to him the amount certified to be due on the taking of such account.

3. An agent has a right of Lien against his principal, varying according to the class of agent to which he belongs.

A Common Law lien, sometimes called a Possessory lien, may be defined as, a right which certain persons have to retain the goods or chattels of another, which are in their lawful possession (actual or constructive), until a debt owing to them by that other person has been satisfied.

The term lien is sometimes extended to those equitable and statutory charges which certain persons, *e.g.* solicitors, have upon property of which they have not the possession.

Common Law liens are either particular or general.

A particular lien is the right which a person has to retain a thing belonging to another until a debt has been satisfied which arose in connection with that particular thing; such is the lien of an unpaid vendor of goods, or of a person who has expended labour and skill upon a chattel. A particular lien is favoured by the Courts, and may be created by express or implied contract, or by construction of law.

A general lien is the right which a person has to retain a thing belonging to another, not only until a debt has been satisfied which arose in connection with that particular thing, but also for a general balance of account owing by its owner; such is the lien of an innkeeper or of a factor. A general lien is not favoured by the Courts, and can only be created by an express or implied contract; thus it may be implied from the custom of a particular trade or business, or from the conduct and course of dealings of the parties.

The following principles regulate the right to a Common Law lien:—

(*a*) The possession of the thing sought to be retained

must be continuous; and if the person claiming the lien voluntarily surrenders his possession, he loses his lien, even though he may subsequently repossess himself of the thing in question—*vide Sweet* v. *Pym* (1800), 1 East. 4, *Hartley* v. *Hitchcock* (1816), 1 Stark, 408, and *Forth* v. *Simpson* (1849), 13 Q. B. 680.

(*b*) The claim must be consistent with the terms upon which the possession was obtained; thus, a factor's lien for his general account only extends to such things as have come into his possession quâ factor—*vide Drinkwater* v. *Goodwin* (1775), 1 Cowp. 251, and *Dixon* v. *Stansfield* (1850), 10 C. B. 398.

A solicitor only has a lien on such papers and deeds of his client as have come into his possession quâ solicitor —*vide Stevenson* v. *Blakelock* (1813), 1 M. & S. 535.

(*c*) A person may derive a right to a lien from the acts of the servants or agents of the owner of the thing in question, provided they are acting with his authority or within the ordinary scope of their employment—*vide Hussey* v. *Christie* (1808), 9 East. 433.

(*d*) The right to a lien may be lost either by express or implied waiver; thus, though the fact of taking security for a debt will not of itself necessarily destroy the right of lien, still the claimant of a lien may lose his lien by taking security under such circumstances as to amount to a waiver of that lien.

Angus v. *McLachlan* (1883), 23 Ch. D. 330; here Kay, L.J., said; "As I understand the law, it is not the mere taking of a security which destroys the lien; but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and which is destructive of it." This

case was confirmed by the Court of Appeal in *In re Taylor & Company* (1891), 1 Ch. 590. C. A.

(*e*) As a general rule, a lien upon a thing does not confer any right to sell the thing—*vide Martindale* v. *Smith* (1841), 1 Q. B. 389, *The Thames Iron Ship Building Company* v. *Patent Derrick Company* (1860), L. J. Ch. 714, *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484. C. A., and *Page* v. *Cowasgee* (1866), L. R. 1 P. C. 127. In the last-mentioned case, Lord Chelmsford, delivering the judgment of the Privy Council, said; "*Martindale* v. *Smith* (1841), 1 Q. B. 389, and other cases have determined that where there is an agreement to purchase property to be paid for at a future time, and the money is not paid at the day, the property remaining in the possession of the vendor, he has no right to sell it, and if he does, the purchaser may maintain trover against him. There may be cases where the vendor might sell without rendering himself liable to an action, as where goods are left in the possession of the vendor, and the purchaser will not remove them and pay the price after receiving express notice from the vendor that, if he fail to do so, the goods will be re-sold."

There seem to be one or two exceptions at Common Law to the rule that lien confers no right of sale. Thus, it seems that an unpaid seller of goods may re-sell the goods if the buyer fails to pay for them, after receiving express notice from the seller of his intention to re-sell, if he is not paid for them—*vide Page* v. *Cowasgee, ubi supra.*

It also seems that an unpaid seller has a right to re-sell the goods, where they are of a perishable nature, and the buyer fails to pay the price—*vide McLean* v. *Dunn* (1828), 4 Bing. 722.

An unpaid seller's right of re-sale is, however, now

regulated by section 48 of the Sale of Goods Act, 1893; which Act will be found set out in the Appendix.

(*f*) It seems that a right of lien is barred by any Statute of Limitations, which does not merely bar the remedy, but also extinguishes the right, *e.g.* The Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27). But it seems that it is not barred by such Statutes of Limitations as bar the remedy only, *e.g.* 21 Jac. I. c. 16, and 3 & 4 Will. IV. c. 42.

Courtenay v. *Williams* (1844), 3 Hare 552, & 8 Jur. 844; here Sir J. Wigram said; "The Statute of Limitations that governs the present case is 21 Jac. I. c. 16, which takes away the remedy against the debtor, unless the action be brought within six years after the cause of action arose; but it leaves the right untouched, differing in this respect from a more recent Statute of Limitations (The Real Property Limitations Act, 1833), by which the right as well as the remedy is barred. In accordance with this construction of the Act it has been repeatedly decided, and is now settled law, that if a creditor by means of a lien or other lawful means can pay himself without resorting to an action against the person of the debtor, he may lawfully do so."

The different Liens of different classes of Agents.—

Auctioneers' Lien.—An auctioneer has possession of the goods which he is employed to sell; and he has a particular lien for the charges of the sale, commission, and auction duty; firstly, upon the goods sold, and after they have been paid for and delivered, upon the price paid for them—*vide Williams* v. *Millington* (1788), 1 H. Bl. 81, *Robinson* v. *Rutter* (1855), 4 E. & B. 954, and *Webb* v. *Smith* (1885), 30 Ch. D. 192. C. A.

Factors' Lien.—A factor has a general lien on the goods and chattels entrusted to him for sale, for the general balance of account arising out of his employment—*vide Kruger* v. *Wilcox* (1755), Amb. 252, and *Walker* v. *Birch* (1795), 6 T. R. 258.

But he has no lien for debts incurred previously to his employment as a factor—*vide Houghton* v. *Mathews* (1803), 3 B. & P. 485.

Brokers' Lien.—Brokers, as a general rule, inasmuch as they have not possession of the goods or chattels which they are employed to buy or sell, have no right of lien. Insurance brokers, however, from the fact that it is the custom to entrust them with the possession of the policies effected by them, have a general lien upon such policies for the general balance of account arising out of their employment—*vide Snook* v. *Davidson* (1809), 2 Camp. 218, and *Mann* v. *Forrester* (1814), 4 Camp. 60.

Common Carriers' Lien.—A common carrier, in the absence of special agreement, has a particular lien upon the goods and chattels carried, for the price of their carriage, both as against the consignor and the consignee—*vide Skinner* v. *Upshaw* (1701), 2 Ld. Raym. 752, and *Rushforth* v. *Hadfield* (1806), 7 East. 224.

By special agreement a carrier may also have a general lien for the general balance of account on the goods carried, against the consignor, or consignee, as the case may be—*vide Rushforth* v. *Hadfield, ubi supra.*

Bankers' Lien.—A banker, in the absence of special agreement to the contrary, has a general lien for the general balance of account upon all bills of exchange or other securities deposited with him by a customer in the ordinary course of his business as a banker—*vide Davis* v. *Bowsher* (1794), 5 T. R. 488, *Bolland* v. *Bygrave* (1825), Ry. & Moo. 271, and *London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413.

But a banker has no general lien upon boxes containing securities which have been deposited merely for safe custody by a customer, who himself keeps the keys of, and has free access to, such boxes—*vide Brandao* v. *Barnett*

(1846), 12 Cl. & F. 787, and *Leese* v. *Martin* (1873), L. R. 17 Eq. 224.

Solicitors' Lien.—A solicitor has, in the absence of special agreement to the contrary, a general lien for the general balance of account, upon all chattels, papers, or deeds which have come into his hands in the ordinary course of his business—*vide Ex parte Stirling* (1809), 16 Ves. 258, *Stevenson* v. *Blakelock* (1813), 1 M. & S. 535, and *Friswell* v. *King* (1846), 15 Sim. 191.

But it seems that a solicitor's lien only extends to his taxable costs, charges, and expenses; which are such costs as can be moderated by the taxing master, and do not include ordinary advances or loans. It also depends upon the circumstances of each particular case, whether the taking of security for a debt by a person having a lien constitutes an abandonment of that lien or not—*vide In re Taylor & Company* (1891), 1 Ch. 590. C. A.

A solicitor has no lien on his client's will nor on any deed made in favour of the solicitor and reserving a life interest or power of revocation to the client—*vide Balch* v. *Symes* (1823), 1 T. & R. 87.

In addition to his passive Common Law lien a solicitor has an equitable charge or lien, which he can actively enforce upon a fund or property which has been recovered by his exertions, for his costs of recovery; this charge or lien is a particular one, and only extends to the costs of the particular suit, matter, or proceeding in which they were incurred—*vide Bozon* v. *Bolland* (1839), 4 M. & Cr. 354.

This charge or lien can be enforced even if the debt is barred by the Statute of Limitations—*vide Higgins* v. *Scott* (1831), 2 B. & Ad. 413.

But it does not extend to real estate—*vide Shaw* v. *Neale* (1858), 6 H. L. 58; neither does it extend beyond the client's own interest—*vide Verity* v. *Wylde* (1859), 7 W. R. 270.

The Solicitors Act of 1860 (23 & 24 Vict. c. 127) also gives to a solicitor a statutory charge or lien; which statutory lien, apparently, does not in any way affect or abrogate the old equitable lien—*vide Hamer* v. *Giles* (1879), 11 Ch. D. 442, and *Rhodes* v. *Sugden* (1885), 29 Ch. D. 517.

The 28th section of The Solicitors Act, 1860, provides as follows: "In every case in which a solicitor shall be employed to prosecute or defend any suit, matter, or proceeding, in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or is depending, to declare such solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such solicitor shall have a charge upon and against, and a right to payment out of the property of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such solicitor, for the taxed costs, charges, and expenses of, or in reference to, such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of, such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: provided always that no such order shall be made by any such court or judge in any case in which the right to recover payment

of such costs, charges, and expenses is barred by any Statute of Limitations."

It seems that the above charge is in the nature of salvage, and may be made on the interests of persons who did not employ the solicitor and who were not parties to the suit, if they adopt the benefit obtained in the suit—*vide Greer* v. *Young* (1882), 24 Ch. D. 545. C. A.

Moreover, it is practically impossible for any right to be acquired over property recovered or preserved without notice of the solicitor's prior right; for it has been decided that notice that the subject-matter of an assignment is the subject-matter of a suit amounts to notice to the assignee of the existence of the solicitor's right to this statutory charge or lien—*vide Cole* v. *Eley* (1894), 97 L. T. 146. C. A.

But a solicitor can only have a charge, under the above Act, upon the fund or property recovered or preserved, in respect of the costs incurred in that particular matter, and not for general costs—*vide Ex parte Thompson* (1860), 3 L. T. 317.

The Lien of Agents who are Quasi-Vendors.—An agent who is a quasi-vendor of goods, that is, in the position of a seller without actually being so, is, by section 38, sub-section 2, of The Sale of Goods Act, 1893 (56 & 57 Vict. c. 7), given the same right of lien for the price of the goods as a person who is a seller in the strict sense of the word.

For the provisions of this Act regarding an unpaid seller's right of lien, see sections 38, 39, 41, 42, 43, and 48, which are set out in the Appendix.

4. A certain class of agents have a right of Stoppage in transitu against their principals.

Strictly speaking, the right of stoppage in transitu is the right of an unpaid seller to stop the goods, while they are in course of transit, upon the insolvency of the buyer.

The transit continues until the goods come into the actual possession of the buyer himself, or into his constructive possession, by some person, as his agent, taking possession of them in his behalf.

The Common Law rules that regulate stoppage in transitu will be found laid down in the following cases:— *Lickbarrow* v. *Mason* (1793), 2 T. R. 63, *Bolitlingk* v. *Inglis* (1803), 3 East. 381, *Whitehead* v. *Anderson* (1842), 9 M. & W. 518, *Kemp* v. *Falk* (1882), 7 App. Cas. 573, *Kendall* v. *Marshall* (1883), 11 Q. B. D. 356, and *Bethel* v. *Clark* (1887), 19 Q. B. D. 553. In the last case, Cave, J., in defining transit, said; "The moment the goods are delivered by the vendor to a carrier to be carried to the purchaser, the transitus begins. When the goods have arrived at their destination, and have been delivered to the purchaser or his agent, or where the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the transitus is at an end."

But though stoppage in transitu is, strictly speaking, confined to sellers, it has been extended by the Courts to such persons as are in the position of sellers; thus, Benjamin, in his book on Sales (4th ed. p. 841), says: "Stoppage in transitu is so highly favoured on account of its intrinsic justice, that it has been extended by the Courts to quasi-vendors; to persons in a position similar to that of vendors."

Feise v. *Wray* (1802), 3 East. 93; here it was laid down that a foreign commission agent, who has bought goods in his own name, and upon his own credit, and has consigned them to his correspondent in this country, may stop such goods in transit upon the insolvency of his principal, who has not paid for them.

Cassaboglou v. *Gibbs* (1883), 11 Q. B. D. 797; here, Brett, M.R., adopting and explaining the words of Blackburn, J., in *Ireland* v. *Livingstone* (1872), L. R. 5 H. L. 395,

said; "Lord Blackburn has said, if the commission agent abroad is bound to pay for the goods to the foreign seller of whom he bought them, and if, after he has shipped them to his principal, such agent has not been paid, and his principal is insolvent, so that the foreign seller could only have the agent to look to for payment, the Courts have held that such agent may stop the goods in transitu, as if he were a vendor, or in the position of a vendor."

It seems that, if at the time of the consignment, a consignor of goods is indebted to the consignee on a general balance of account, and consigns the goods to the consignee by way of a pledge to meet such balance, such consignor would have no right of stoppage in transitu—*vide Vertue* v. *Jewell* (1814), 4 Camp. 31.

An agent who is a quasi-vendor of goods, is, by section 38, sub-section 2, of the Sale of Goods Act, 1893, given the same right of stoppage in transitu as a person who is a seller in the strict sense of the word.

For the provisions of this Act regarding a seller's right of stoppage in transitu, see sections 39, 44, 45, 46, 47, and 48, which are set out in the Appendix.

CHAPTER V.

RIGHTS AND DUTIES OF PRINCIPAL AND AGENT WITH REGARD TO THIRD PARTIES.

With regard to Contracts.—As a general rule, when an agent contracts in a representative capacity for a principal, the principal alone is entitled to sue upon the contract, and alone is liable to be sued upon it. Thus we find the maxims, "Qui facit per alium facit per se," and "Respondeat superior."

Montgomerie v. *United Kingdom Mutual Steamship Association* (1891), 1 Q. B. 370; here we find it laid down by Wright, J.; "There is no doubt whatever as to the general rule as regards an agent; that where a person contracts as agent for a principal, the contract is the contract of the principal and not that of the agent; and, *primâ facie* at common law, the only person who may sue is the principal, and the only person who can be sued is the principal. To that rule, of course, there are many exceptions."

Ex parte Hartop (1806), 12 Ves. 349; here Lord Erskine, L.C., said; "No rule of law is better ascertained or stands upon a stronger foundation than this: that where an agent names his principal, the principal is responsible, not the agent. But, for the application of that rule, the agent must name his principal as the person to be responsible"

Spittle v. *Lavender* (1821), 2 B. & B. 452; here, Park, J., said; "On the general rule of law, namely, that where

the principal is known, the agent is not liable, there can be no doubt; though it is true that an agent may, under certain circumstances, render himself liable at all events."

And it seems, as a general rule, that even though an agent, when making a contract for a principal, does not name that principal, still, if he clearly states that he is acting as an agent only, he is not personally liable—*vide Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126, and *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374, at pp. 88, 89, *post.*

With regard to written Contracts entered into by an Agent.—According to some of the older cases, if an agent entered into a written contract for a principal, in which he signed his own name without any qualification indicating agency, the mere fact that he stated in the body of the contract that he was acting "as agent for," or "on account of," a named principal, did not prevent him from being personally liable upon such contract. The principal would, of course, also be liable, except in the case of Indentures, Bills, and Notes, with regard to which, *vide* p. 98, *post.*

Paice v. *Walker* (1870), L. R. 5 Ex. 173; here it was held that, upon the authority of previous cases, if a person signed a contract in his own name without qualification, he would not be exempted from personal liability upon such contract by merely describing himself in the body of contract "as agent" for a named principal. In this case the contract upon which the defendant was held liable ran as follows:—"Sold A. J. Paice, Esq., London, about two hundred quarters of wheat, as agents for John Schmidt and Company, Danzig, etc.—(Signed) Walker and Strange."

It seems, however, that the law as laid down in *Paice* v. *Walker, ubi supra,* was altered by the Court of Appeal in *Gadd* v. *Houghton* (1876), 1 Ex. Div. 357. C. A. In this case the contract upon which the action was brought

ran as follows: "Mr. George Gadd, we have this day sold to you on account of James Morand and Company, Valencia, 2000 cases of Valencia oranges, etc.—(Signed) J. C. Houghton and Company." The Court of Appeal, reversing the Exchequer Division, held that the defendant was not personally liable upon this contract. In giving judgment, James, L.J., said; "The *ratio decidendi* in *Paice* v. *Walker* (1870), L. R. 5 Ex. 173, was that, having regard to the contract and all the circumstances of the case, the words "as agents" must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain "on account of" another person. Those are the very words used in the present case. When a man says he is making a contract "on account of" some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to *Paice* v. *Walker*, I cannot conceive that the words "as agents" can be properly understood as implying merely a description. The word "as" seems to me to exclude that idea. If that case were now before us, I should hold "as agents" in that case had the same effect as the words "on account of" in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, but I do not think "as agents" were words of description."

Quain, J., also said; "It is said that in order to relieve the agent from liability, he must sign "as agent" of Morand and Company. I cannot see the necessity for adding those words to the signature, if you can gather from the contract that he makes it on account of Morand and Company. Those words at the end of the signature would add nothing to what has been stated in the body of the contract."

Hahn v. *The North German Pitwood Company* (1892), 8 T. L. R. 557; here it was decided that the defendant (an agent) was not liable upon a contract which he signed "as agent," even though he signed for a foreign principal. In this case the contract note upon which defendant was sued ran as follows: "Sold to M. Hahn, Esq., for Mr. Joachimsohn of Dantzic . . . for North German Pitwood Company, Limited.—(Signed) Emile Schultze, as agent."

Glover v. *Langford* (1892), 8 T. L. R. 628; here it was held that defendant (an agent) was not liable upon the following contract note: "Bought by Messrs. C. H. Glover and Company of Hatcham, of Messrs. John E. Young and Company of Riga, through the agency of Mr. J. B. R. Langford, about one hundred standards of white cords, etc." This note was sent to plaintiff by defendant enclosed in a letter signed in defendant's own name without any qualification. In giving judgment, Charles, J., said; "He (defendant) has signed the letter without any qualification "as agent," and until recently that would probably have been decisive of his personal liability. There are many cases which point in that direction. The true rule is now laid down in *Gadd* v. *Houghton* (1876), 1 Ex. Div. 357, in which the Court of Appeal held that in a contract signed without qualification, the words "on account of" were sufficient to show agency. There *Paice* v. *Walker* (1870), L. R. 5 Ex. 173, is treated as overruled. It is enough if you can gather from the document that he signed as agent."

It appears, therefore, to be now settled law, that where an agent makes a written contract for a principal, the principal alone will be entitled and liable upon such contract, provided that it is clearly stated upon the face of the contract (whether in the body or the signature being immaterial) that the agent is making the contract for, or on account of, a named principal. Moreover, it does not seem to be necessary for an agent, when making a written

contract, even to name his principal, so long as it is clearly stated upon the face of the contract that the agent is contracting on behalf of a principal.

Fleet v. *Murton* (1871), L. R. 7 Q. B. 126; here the contract upon which defendant was sued ran: "We have this day sold for your account to our principal, so many tons of raisins, etc.—(Signed) M. and W., brokers." It was held that, but for a particular custom proved to obtain in the London fruit market, the defendant would not have been personally liable upon such a contract. In giving judgment, Cockburn, C.J., said; "I quite agree with the propriety and soundness of the decision given by the Court of Exchequer in the recent case of *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169, where the plaintiff contracted as a broker for a principal named; for in that case the principal was named; and I am of opinion that the same principle would apply where the principal is not named, so long as it appears on the face of the contract that the broker is contracting as broker for a principal, and not for himself as principal; and in that case also the broker would not be liable on the contract, if the principal failed to fulfil his contract." Blackburn, J., also said; "There is no doubt at all in principle that a broker as such, merely dealing as broker, and not as purchaser, makes a contract from the very nature of things between the buyer and seller, and is not himself either buyer or seller; and that consequently, where the contract says, "sold to A. B.," or "sold to my principals," and the broker signs himself simply as broker, he does not make himself by that either the buyer or the seller of the goods."

Southwell v. *Bowditch* (1876), 1 C. P. D. 374; here the defendant, who was a broker, signed and sent to the plaintiff a contract note in the following terms: "Have this day sold by your order and for your account, to my principal, five tons of anthracene, etc.—(Signed) W. A. Bowditch." Here the Court held that in the absence of any custom

making the defendant personally liable, he was not liable upon such a contract.

But though it is now the general rule of law that an agent who makes a written contract for a principal is not personally liable upon it, if it is clear upon the face of such contract that he is only acting in a representative capacity; still it must be remembered, that in the absence of words in the body of the contract, clearly indicating agency, the mere addition to the agent's signature of such words as, "Agent," "Broker," "Manager," or "Director," will not exempt him from liability; seeing that such words are regarded as words of description merely.

It must be pointed out here that whenever a principal or an agent is entitled to sue upon a contract, such principal or agent is also liable to be sued; and likewise, whenever a principal or an agent is liable to be sued upon a contract, such principal or agent is also entitled to sue upon such contract.

Elbinger Actien Gesellschaft v. *Claye* (1873), L. R. 8 Q. B. 313; here Blackburn, J., said; "I quite agree that a man may as agent make a contract upon such terms as not only to bind himself, but also to bind his principal; in other words, so that the principal shall be party to the contract, and may then either sue or be sued. I must say I think that the two things are correlative. A man cannot make a contract in such a way as to take the benefit, unless he take also the responsibility of it."

Montgomerie v. *United Kingdom Mutual Steamship Association* (1891), 1 Q. B. 370; here Wright, J., adopted the dictum of Blackburn, J., in the above case.

United Kingdom Mutual Steamship Association v. *Nevill* (1887), 19 Q. B. D. 110; here Lord Esher, M.R., also laid down the same principle.

There are the following exceptions to the general rule

that the principal alone is entitled and liable upon contracts made by his agents:—

1. If an agent makes a contract, not by indenture, in his own name, for an undisclosed principal (*i.e.* without disclosing the existence of a principal), either the agent or the principal is entitled to sue, and liable to be sued upon it; and if the contract is a written one, extrinsic evidence is admissible (except in the case of Indentures, Bills, and Notes), for the purpose of showing that a contract which upon the face of it is made by a person as principal is really made by him as agent. Thus we find it stated in Smith's Leading Cases (10th ed. vol. ii. p. 401): "The true rule, it is submitted, is, that parol evidence is admissible for the purpose of introducing a new party, but never for that of discharging an apparent party to the contract." [But though, as a general rule, extrinsic evidence is inadmissible for the purpose of discharging an apparent party to a written contract, still it appears from *Wake* v. *Harrop* (1862), 6 H. & N. 768, that if an agent has contracted in writing so as to render himself personally liable, extrinsic evidence is admissible as an equitable defence, to show that it was expressly agreed that he should not be liable, and that the agreement rendering him liable was so drawn by mistake.]

For the above rule, *vide* the following cases:—

Sargent v. *Morris* (1820), 3 B. & Ald. 277; here it was laid down that where an agent has acted in his own name, it is no answer to an action brought in his name to say that he is merely an agent; unless it can also be shown that he is prohibited from carrying on the action by his principal. In such a case the action can be brought either in the name of the party by whom the contract was made, or of the party for whom the contract was made.

Sims v. *Bond* (1833), 5 B. & A. 389; here Denman, C.J., delivering the judgment of the Court, said; "It is a well-established rule of law that where a contract not under seal

is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it: the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party. . . . But where money is lent by another in his own name, the plaintiff who alleges that he was in reality the lender must prove the fact distinctly and clearly."

Jones v. *Littledale* (1837), 6 A. & E. 490; here it was laid down, that though undoubtedly evidence was admissible on behalf of a contracting party, to show that the other contracting party was an agent only (though he contracted in his own name), and so to fix the real principal; still, if an agent contracted in such a form as to make himself personally responsible, he could not afterwards, whether his principal was or was not known at the time of the contract, relieve himself from that responsibility.

Higgins v. *Senior* (1841), 8 M. & W. 834; here Parke, B., delivering the judgment of the Court, said; "It is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract; so as, on the one hand, to give the benefit of the contract to, and on the other hand, to charge with liability, the unnamed principals: and this whether the agreement be or be not required to be in writing by the Statute of Frauds. And this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent in signing the agreement in pursuance of this authority is in law the act of the principal."

Armstrong v. *Stokes* (1872), L. R. 7 Q. B. 598; here Blackburn, J., said; "It is, we think, too firmly established to be now questioned, that where a person employs another to make a contract of purchase for him, he as principal is liable to the seller, though the seller never heard of his

existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he was not."

Kendall v. *Hamilton* (1879), 4 App. Cas. 504; here Lord Cairns, L.C., said; "I take it to be clear that where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal; but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even though the judgment does not result in satisfaction of the debt."

Hicks v. *Tweedy* (1890), 63 L. T. N.S. 765; here it was laid down that if an agent signs a written contract in his own name without any qualification, he is personally liable, unless there is something in the body of the contract inconsistent with the existence of the agent's personal liability.

Though it is clear that, if an agent contracts in his own name, the third party can elect whether he will sue the agent or the principal, still, as soon as he has made his election, the matter is at an end, and he cannot afterwards sue the other party.

Priestley v. *Fernie* (1865), 3 H. & C. 977; here it was laid down; "If this were an ordinary case of principal and agent, where the agent having made a contract in his own name has been sued on it to judgment, there could be no doubt that no second action would be maintainable against the principal. . . . It may be that an action against one might be discontinued and fresh proceedings be well taken against the other."

Whether there has been an election or not is as a general rule a question of fact for the jury—*vide Calder* v. *Dobell* (1871), L. R. 6 C. P. 486, and *Curtis* v. *Williamson* (1874), 10 L. R. Q. B. 57. In the last case, the Court said; "The question is what is sufficient to constitute a binding election

in point of law. In general the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge, as was done in the case of *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486. But there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceedings against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal."

If, in the case of a contract made by an agent in his own name, the principal himself sues the third party, the latter has the same right of Set-off or Counterclaim against the principal, as he has against the agent; but if the third party knew, or ought to have known, that the agent was such, then he cannot claim this right.

Rabone v. *Williams* (1785), 7 T. R. 360; here it was laid down that where a factor conceals his principal, and delivers goods in his own name, the person dealing with him has a right to consider him to all intents and purposes as the principal; and though the real principal may sue upon the contract, yet the purchaser has a right to set-off any claim he may have against the factor in answer to the demand of the principal.

Montagu v. *Forwood* (1893), 2 Q. B. 350. C. A.; here it was laid down by the Court of Appeal, approving the decision in *Rabone* v. *Williams, ubi supra,* that the defendant could set-off against the plaintiff (the principal) a debt due to the defendant from the agent, seeing that at the time the agent made the contract with the defendant he did not know, nor had any reason to believe, that the agent was not acting as principal in the matter.

Cooke v. *Eshelby* (1887), 12 App. Cas. 271; here a firm of brokers sold cotton to Cooke and Sons in their own name, though really they were selling on behalf of a third party; Cooke and Sons knew that they were dealing with brokers,

but admitted that, though they dealt with the brokers as principals, they had no belief one way or the other whether they were really dealing with principals or brokers. The House of Lords held that money owed by the brokers to Cooke and Sons could not be set-off against the price of the cotton in an action brought by the third party; and they laid it down that a purchaser could never set-off a debt due by an agent against one due to the principal, unless it could be shown that the circumstances attending the sale were calculated to induce, and did induce in the mind of the purchaser, a reasonable belief that the agent was selling on his own account, and not for an undisclosed principal; and that, moreover, it must be shown that the agent was enabled to appear as the principal by the authority, express or implied, of the principal.

If there happen to be a particular custom of any trade, business, or locality, which entitles a third party with whom an agent contracts, to set-off or counterclaim against the real principal where under ordinary circumstances he could not do so, such a custom, if unreasonable, will only bind the real principal, if it can be clearly proved that he knew and agreed to be bound by it.

Blackburn v. *Mason* (1893), 9 T. L. R. 286. C. A.; here a country broker employed a London broker to transact certain business on the London Stock Exchange for his principal; the country broker did not give the name of his principal when instructing the London broker, but apparently the latter knew that the country broker was acting as an agent. It was contended that, by reason of a custom of the London Stock Exchange, when a London broker was employed directly by a country broker, he had a right to treat the latter as his principal, and to set-off any claim which he had against the country broker. The Court held that the custom in question was unreasonable, and that the plaintiff (the principal) was not bound by it

unless he could clearly be proved to have known of it, and to have agreed to be bound by it.

Anderson v. *Sutherland* (1897), 13 T. L. R. 163; here the plaintiff employed a broker at Paisley, who in turn employed the defendant, a London broker, to sell certain shares for him on the London Stock Exchange. The defendant and the Paisley broker had other transactions, and when defendant had sold plaintiff's shares, he credited the Paisley broker in account with the amount realized, in accordance with a custom of the London Stock Exchange. The Paisley broker absconded, and plaintiff sued the defendant for the proceeds of the sale of his shares. Lord Russell, C.J., gave judgment for the plaintiff, holding that the defendant was employed under such circumstances that he knew, or ought to have known, that the country broker had a principal behind him, and that the custom of the Stock Exchange in question was unreasonable, and could only bind the plaintiff if he clearly agreed to be bound by it.

2. If an agent who contracts in his own name for an undisclosed principal goes so far as to expressly describe himself as the principal, in a written instrument, he will alone be entitled and liable upon the contract.

Humble v. *Hunter* (1848), 12 Q. B. 310; here the son of a woman, in making a contract concerning a ship of which she was owner, expressly described himself in the charter-party as its "owner;" the court held that oral evidence showing that the son was not really the principal was inadmissible, and that he alone could sue upon the contract. In giving judgment, Patterson, J., said; "If the contract had been made in the son's name merely, without more, it might have been shown that he was agent only, and that the plaintiff was the principal. But as the document itself represents that the son contracted as owner, *Lucas* v. *de la Cour* (1813), 1 M. & S. 249, applies."

3. If an agent, who has no authority express or implied to contract in his own name, does so, he will alone be entitled and liable upon the contract. Thus, as a general rule, a broker has no authority implied in law to sell in his own name, and if he does so, renders himself personally liable —*vide Baring* v. *Corrie* (1818), 2 B. & Ald. 143, at p. 29, *ante*.

4. An agent may expressly contract in such terms as to render himself personally entitled and liable upon the contract, even though he contracts for a named principal.

Parker v. *Winlow* (1857), 7 E. & B. 942; here Lord Campbell, C.J., said; "On principle and on the authorities cited, an agent is personally liable if he is the contracting party; and he may be so though he names his principal."

Fisher v. *Marsh* (1865), 6 B. & S. 411; here Blackburn, J., said; "The general rule is that when an agent makes a contract, naming his principal, the contract is made with the principal and not with the agent. But even where the principal is known, a contract in writing may be made by an agent with a third party in such terms that he is personally bound to the fulfilment of it; as if he says, "I for my own self contract"; in such a case there is a personal contract by the agent, and he may sue or be sued upon it; though the principal may interfere and claim the benefit of it, as was decided in *Higgins* v. *Senior* (1841), 8 M. & W. 834."

Christoffersen v. *Hansen* (1872), L. R. 7 Q. B. 509; here Blackburn, J., said; "In a charter-party, as in every contract, if the agent chooses to make himself a contracting party, the other contracting party may either sue the agent who has himself contracted though on behalf of another, or he may sue the principal who has contracted through his agent; and this whether the principal was known at the time or not, or whether it was or was not known that there was a principal."

Montgomerie v. *United Kingdom Mutual Steamship*

Association (1891), 1 Q. B. 370; here Wright, J., said; "In all cases the parties can by their express contract provide that the agent shall be the person liable, either concurrently with, or to the exclusion of, the principal; or that the agent shall be the party to sue, either concurrently with, or to the exclusion of, the principal."

5. At Common Law, if an agent makes a contract for his principal by indenture, the principal is not entitled to sue, or liable to be sued upon it, unless the agent executes the indenture in the name of his principal.

Wilks v. *Buck* (1802), 2 East. 142; it was held in this case that an agent who executes a deed *inter partes* under a power of attorney, must, in order to make his principal entitled and liable upon it, execute it in the name of the principal; but if that is done, it does not matter whether the agent signs "A. B. by his attorney C. D.," or "C. D. for A. B.;" for in either case the act of sealing and delivering is done in the name of the principal, and whether the agent puts his name first or last does not affect the validity of the act.

Berkeley v. *Hardy* (1826), 5 B. & C. 355; here it was held that in the case of a deed *inter partes* no person could maintain an action upon such deed unless he was a party to it.

Beckham v. *Drake* (1841), 9 M. & W. 79; here it was held that only those could sue or be sued upon an indenture who are named or described in it as parties.

Montgomerie v. *United Kingdom Mutual Steamship Association* (1891), 1 Q. B. 370; here Wright, J., said; "He (the principal) may be excluded if the contract is made by deed *inter partes* to which the principal is no party. In that case by ancient rule of Common Law it does not matter whether the person made a party is or is not an agent. This, however, does not apply here, as this instrument is a deed poll."

But now by section 46 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), it is provided as follows:—(1) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done, shall be as effectual in law to all intents as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. (2) This section applies to powers of attorney created by instrument executed either before or after the commencement of this Act."

6. The same rule of Common Law applies in the case of Bills of Exchange and Promissory Notes as in the case of Indentures. And accordingly a principal is not entitled or liable upon a bill or note executed by his agent, unless the agent executes the instrument in the name of his principal.

Leadbitter v. *Farrow* (1816), 5 M. & S. 345; in this case Lord Ellenborough said; "Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable unless he states upon the face of the bill that he subscribes it for another or by procuration of another, which are words of exclusion? Unless he plainly says, I am the mere scribe, he is liable."

Beckham v. *Drake* (1841), 9 M. & W. 79; here Baron Parke said; "The case of bills of exchange is an exception which stands upon the Law Merchant, and promissory notes another, for they are placed upon the same footing by the Statute of Anne. In neither of these can any but the parties named in the instrument by their name or firm be made liable to an action upon it."

Alexander v. *Sizer* (1869), L. R. 4 Ex. 102; here the defendant was sued upon a promissory note which ran as

follows: "£1500. On demand I promise to pay Messrs. Alexander and Company or order, etc. For Mistley, Thorpe and Walton Railway Company. John Sizer, Secretary." The Court held that the defendant was not liable upon this note.

Dutton v. *Marsh* (1871), L. R. 6 Q. B. 361; here an action was brought upon the following promissory note: "We, the directors of the Isle of Man Slate Company, Ltd., do promise to pay J. Dutton £1600 with interest at 6 per cent. till paid, for value received—(Signed) R. J. M.
J. H.
S. B.
H. J."

In the corner of the note the company's seal was affixed.

The Court held that the directors were personally liable upon this note, inasmuch as they had merely described themselves as directors of the Isle of Man Slate Company, but had not stated that they were acting on behalf of or on account of such company; and that the fact of the company's seal being affixed was not sufficient to show that the note was signed on behalf of the company. In delivering the judgment of the Court, Cockburn, C.J., said; "The effect of the authorities is clearly this, that where parties in making a promissory note, or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account of or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable."

Montgomerie v. *United Kingdom Mutual Steamship Association* (1891), 1 Q. B. 370; here Wright, J., said; "If a person who is an agent makes himself a party in writing to a bill or note, a principal cannot be added."

Section 23 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), now provides as follows:—

Section 23. "No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such; provided that—

(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name.

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm."

By virtue of the above section, the signature must be the principal's and not the agent's. But it seems that, by virtue of the two following sections of the same Act, the principal's signature may be written by the hand of an agent.

Section 26. (1) "Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether the signature on the bill is that of the principal or the agent, the construction most favourable to the validity of the instrument shall be adopted."

Section 91. (1) "When by this Act any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority."

7. If an agent has a possession coupled with an interest, in the subject-matter of the contract, he is entitled to sue and liable to be sued (concurrently with his principal),

even though he contracts on behalf of a named principal; *e.g.* an auctioneer.

Williams v. *Millington* (1788), 1 H. Bl. 81; here Lord Loughborough said; "An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay."

This case was approved of in *Robinson* v. *Rutter* (1855), 4 E. & B. 954, and in *Woolfe* v. *Horne* (1877), 2 Q. B. D. 355.

Whenever an agent does sue in his own name, the defendant can avail himself of any such defence as would be good against the agent himself, who is the plaintiff on the record—*vide Bauerman* v. *Radenius* (1798), 7 T. R. 663, *Gibson* v. *Winter* (1833), 5 B. & Ad. 96, and *Wilkinson* v. *Lindo* (1840), 7 M. & W. 81. In the last case Parke, B., said; "The matter was there (in *Gibson* v. *Winter, ubi supra*) a good deal considered, and it was held that whatever constitutes an answer to the demand for which an action is brought as against the plaintiff on the record, is a bar to the action, although brought for the benefit of others, who have no mode of enforcing their claim except by suing in the name of the plaintiff."

The defendant can also avail himself of any such defence as would be good against the principal for whom the action is brought—*vide R.* v. *Hardwick* (1809), 11 East. 578, *Smith* v. *Lyon* (1813), 3 Camp. 465, and *Welstead* v. *Levy* (1831), 1 M. & Rob. 138.

An auctioneer's right to sue in his own name is dependent on the right of his principal to sue.

Dickenson v. *Naul* (1833), 4 B. & Ad. 638; here it was laid down; "For the plaintiff (the auctioneer) it was contended that the auctioneer had a right of action for goods sold by him in the course of his business; and undoubtedly he may sue where the right of no third party intervenes. But where such right is established, and the person employing the auctioneer is proved not to be the owner, it then becomes clear that the auctioneer, who can have no interest in the goods but what he derives from his employer, has no longer any claim upon the property against the right owner."

8. An agent may be personally entitled and liable, either concurrently with or to the exclusion of his principal, by reason of a particular custom; and this even though he contracts as an agent and names his principal. Thus it has been decided that a commission agent who contracts for a correspondent residing abroad, has not, unless it can be proved that he has a special authority to do so, any authority to bind that correspondent to the contract; and that therefore, even though the foreign correspondent be named as principal, credit is given exclusively to the agent.

Armstrong v. *Stokes* (1872), L. R. 7 Q. B. 598; here Blackburn, J., delivering the judgment of the Court, said; "The great inconvenience that would result if there were privity of contract established between the foreign constituent of a commission merchant and the home suppliers of the goods, has led to a course of business in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness, perhaps, still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the

grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit."

Hutton v. *Bullock* (1874), L. R. 9 Q. B. 572; here the principle laid down in *Armstrong* v. *Stokes, ubi supra*, was confirmed, and Brett, J., held that when a foreign merchant residing abroad dealt in England through an English correspondent or agent, it was not in the ordinary course for the foreign merchant to authorize the English agent to bind him to the English contract.

Malcolm Flinn and Company v. *Hoyle* (1893), 63 L. J. Q. B. 1. C. A.; here Lopes, L.J., said; "It has been held for the sake of mercantile usage and convenience that an agent dealing in goods with a merchant resident abroad cannot, without evidence of express authority to that effect, pledge his foreign correspondent's credit, and therefore must get trust in person. That, no doubt, is the rule; but I cannot see that it has any application to the contract in this case. There is nothing in the rule, I need scarcely say, to prevent the foreign merchant from himself contracting with the other merchant; and the question is, whether in this case the foreign merchant did not so contract with the merchant in this country. I am clearly of opinion that he did."

It seems, however, that even when an agent is contracting for a foreign principal, the presumption in favour of the agent's liability may be easily rebutted; and that it really becomes a question of fact, depending upon the particular circumstances of each case, whether the agent is personally liable or not.

Gadd v. *Houghton* (1876), 1 Ex. Div. 357. C. A. (*vide* p. 85, *ante*); here the Court of Appeal held that the words "On account of James Morand and Company," contained in a written contract, showed that the defendants (the brokers) intended to pledge exclusively the credit of their foreign principal; and that they were not themselves liable upon the contract.

Reynolds and Company v. *Peapes* (1890), 6 T. L. R. 49; here the defendants, who resided in Sydney, employed an agent to buy for them in England. In giving judgment, Mathew, J., said; "Though the foreign principal in such a case is *primâ facie* not liable, yet this presumption is liable to be rebutted."

Hahn v. *The North German Pitwood Company* (1892), 8 T. L. R. 557 (*vide* p. 87, *ante*); here it was held that an agent was not liable upon a contract which he had signed "as agent," even though he had signed as agent for a foreign principal.

Glover v. *Langford* (1892), 8 T. L. R. 628 (*vide* p. 87, *ante*); here Charles, J., in giving judgment, said; "In referring to the other cases, it appears that in point of law there is no distinction as to the liability of an agent acting on behalf of an English or a foreign principal; it is always a question of fact; though no doubt the circumstance that an Englishman is acting for a foreigner is a circumstance of great weight. If the goods are to be bought in England he would not be chargeable unless he had made himself directly liable. On the other hand, when he is acting for a foreign principal, that ought to be remembered."

When one solicitor employs another to act for his principal, even though the principal is named, by a custom of solicitors, credit is exclusively given by the one solicitor to the other; it being unusual for the principal to give his solicitor any authority to pledge his credit to another solicitor.

Scrace v. *Whittington* (1823), 2 B. & Cress. 11; here it was laid down that the attorney who does the business always gives credit to the attorney who employs him, and not to the client for whose benefit it is done.

Waller v. *Holmes* (1860), 6 Jur. N.S. 1367, & 30 L. J. Ch. 14; here it was held that the client of a country solicitor employs only the solicitor in the country; the London agent giving credit exclusively to the solicitor in the country.

A custom of a particular trade may also render an agent personally liable upon a contract, if he does not mention the name of his principal, even though he is known to be contracting as an agent.

Franklyn v. *Lamond* (1847), 4 C. B. 637; here it was laid down that, by custom, an auctioneer is liable if he does not name his principal, even though he contracts "as auctioneer." And Wilde, C.J., said; "I apprehend it to be very old law that an auctioneer who sells without at the time of the sale disclosing the name of his principal contracts personally."

Humfrey v. *Dale* (1858), 7 E. & B. 266; here it was held that evidence was admissible of a custom of a particular trade, by which if a broker purchased without disclosing the name of his principal, he was himself personally liable, even though he was known to be acting as an agent.

Fleet v. *Murton* (1871), L. R. 7 Q. B. 126; here it was held that evidence was admissible of a custom of the London fruit trade by which if a broker, though known to be contracting as an agent, does not give his principal's name, he is personally liable, concurrently with his principal.

Hutchinson v. *Tatham* (1873), L. R. 8 C. P. 482; in this case the defendants acting as agents for A entered into a charter-party, which they signed "as agents to merchants," without disclosing the name of their principal: it was held

in an action brought by the shipowners against the defendants on the charter-party, that evidence was admissible of a trade custom by which, if the name of the principal was not disclosed within a reasonable time, the agent was personally liable.

Pike v. *Ongley* (1887), 18 Q. B. D. 708; here it was held that evidence was admissible of a custom of the hop market, by which a broker, even though contracting as such, is personally liable, concurrently with his principal, if he does not disclose the name of his principal at the time of making the contract.

9. An agent is exclusively entitled and liable upon a contract who, though describing himself as an agent, but without naming a principal, is in reality himself the principal; and it seems that even though the professing agent names a principal, he will still be exclusively entitled and liable, if the other party, though knowing who the real principal is, nevertheless partly performs, or accepts part performance, of the contract.

Schmaltz v. *Avery* (1851), 16 Q. B. 665; in this case the plaintiff sued upon a charter-party which was expressed to be made between the defendant as owner of the ship of the one part, and "G. Schmaltz and Company, agents of the freighter, of the other part." It was held that the plaintiffs, who were really the principals, were entitled to sue. Patterson, J., delivering the judgment of the Court, said; "A passage in the judgment of the Court in *Rayner* v. *Grote* (1846), 15 M. & W. 359, was much relied upon: "If indeed the contract had been wholly unperformed, and one which the plaintiff by merely proving himself to be the real principal was seeking to enforce, the question might admit of some doubt. In many cases, such as for instance the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it

is clear that the agent cannot then show himself to be the real principal and sue in his own name: and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed, without the knowledge of who is the real principal, may be the general rule." With this passage we entirely agree; but it is plain that it is applicable only to cases where the supposed principal is named in the contract; if he be not named it is impossible that the other party can have been in any way induced to enter into the contract by way of the reasons suggested."

Carr v. *Jackson* (1852), 7 Ex. 382, & 21 L. J. Ex. 137; in this case it was held that if a person describes himself in a written contract as an agent for an unnamed principal, he is himself liable upon the contract, if proved to be the real principal; and it is permissible for the other party to adduce parol evidence to show that the professing agent is the real principal.

Rayner v. *Grote* (1846), 15 M. &. W. 359; in this case the plaintiff entered into a written contract for the sale of goods, in which he described himself as an agent for a named principal, whereas he was himself the real principal. The other party, although he knew that the professing agent was himself the principal, accepted part delivery of the goods from him as such. The Court held that under these circumstances the plaintiff could himself sue for the non-acceptance of the residue of the goods, and for non-payment of the stipulated price.

10. An agent is exclusively entitled and liable upon the contract when he names a principal who is non-existent. Neither can there be any ratification by a principal who is non-existent at the time that the contract is entered into.

Kelner v. *Baxter and others* (1867), L. R. 2 C. P. 174; here the defendants, who were some of the promoters of a

prospective company, entered into a contract in its behalf and in its name (the contract being signed, "on account of the Gravesend Royal Alexandra Hotel Company") before the company had come into existence. The Court held that the said promoters were personally liable upon the contract; and that a subsequent ratification of the contract by the company after it had come into existence could only take place with the plaintiff's consent; and would then be a new contract altogether. It also held that parol evidence to show that the personal liability of the defendants was not intended, was inadmissible. Erle, C.J., in giving judgment, said; "The cases referred to in the course of the argument fully bear out the proposition that where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility."

Steele v. *Gourley* (1886), 3 T. L. R. 119 & 772; here it was held that the executive committee of a club, or the members thereof who give an order or who authorize the giving of an order, for goods to a tradesman, in the name of and on behalf of the club, are personally liable for such goods: for a club is not a legal entity, nor has it in the eyes of the law any existence at all. In giving judgment, Brett, M.R., said; "Although a tradesman, upon an order being given by an agent, supposes that that agent is authorized by a particular individual to give the order, and it afterwards appears that that individual has not authorized the agent to give the order, but that some other person has authorized him to do so, that other person is liable to the tradesman, and the individual to whom the tradesman has in his mind given credit is not liable." Lopes, L. J., also said; "The plaintiff may think he is contracting with the club, and

may give credit to the club, but he can only sue the real principal."

But it seems that the mere fact that a person is a member of a club committee will not in itself make him liable for goods which have been ordered without his authority—*vide Todd* v. *Emly* (1841), 8 M. & W. 505, and *Draper* v. *Earl Manvers* (1893), 9 T. L. R. 73.

Moreover, when an agent can prove that a third party with whom he contracted did not rely on his personal credit, but exclusively gave credit to some particular fund, as a parish fund, or the fund of a corps, an officers' mess fund, or the fund of a club, then the agent will not be personally liable—*vide Williams* v. *Hathaway* (1877), 6 Ch. D. 544, *Jones* v. *Hope* (1886), 3 T. L. R. 247. C. A., and *Hawke* v. *Cole* (1890), 62 L. T. N.S. 658.

11. An agent is exclusively entitled and liable upon the contract when he contracts on behalf of a principal who is incapable of making the contract in question.

Furnival v. *Coombes* (1843), 5 M. & G. 736, & 7 Jur. 399; here the defendants, who were churchwardens and overseers of the poor, entered into a contract for themselves, their successors and assigns, to pay for certain repairs done to their parish church. In the indenture of contract there was a proviso to the effect that the defendants were not to be personally liable upon the covenant, as they were making the contract in their corporate character merely. The Court held that they had no authority to make the contract in question in their corporate capacity, as they had no common seal to bind themselves with, and that the proviso must be considered void as being repugnant to the general intention of the instrument, and that the defendants were personally liable upon the contract. Tindal, C.J., said; "The first question

is whether this is a personal covenant, or a covenant by defendants as a corporate body. It must fall within the one class or the other. Churchwardens and overseers, though they are by statute a corporate body for some purposes, cannot enter into such a covenant as this in a corporate character; and, if not, then the contract must be a personal covenant."

12. An agent is exclusively entitled and liable upon the contract, if the third party has, notwithstanding that he knew the name of the real principal, elected to treat the agent as the principal, and to give exclusive credit to him.

Paterson v. *Gandasequi* (1812), 15 East. 62, & 2 Sm. L. C. 10th ed. 355; in this case, Gandasequi (a Spanish merchant) came to England and employed L. and Company as his agents to purchase him certain goods. Plaintiff sent samples of the goods required to L. and Company's counting-house, and Gandasequi himself being present inspected them, selected those he required, and discussed the price with the plaintiff. L. and Company subsequently ordered the goods; and the plaintiff debited the goods to them, and treated them as his debtors. Ultimately L. and Company failed, and the plaintiff then sued Gandasequi. The Court held that the defendant was not liable, on the ground that the plaintiff, although he knew that L. and Company were acting as agents, and also knew the real principal's name, nevertheless chose L. and Company as his debtors, and gave exclusive credit to them. Lord Ellenborough, C.J., said; "The law has been settled, by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him: but that must be taken with some qualification; and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor."

Addison v. *Gandasequi* (1812), 4 Taunt. 574, & 2 Sm. L. C. 10th ed. 361; the facts in this case were similar

to those in the last-mentioned case. And, when L. and Company failed, the plaintiff sued Gandasequi for the price of the goods, although he had previously chosen, with a full knowledge of the name of the real principal, to debit L. and Company with the price. The Court held, upon the same grounds as in the last case, that the defendant was not liable.

From the two above cases we must distinguish the case of *Thomson* v. *Davenport* (1829), 9 B. & C. 78, & 2 Sm. L. C. 10th ed. 368, in which the facts were as follows: An agent (McKune), when buying certain goods for his principals, represented to the seller that he was buying them on behalf of persons resident in Scotland, but he did not give their name, neither did the seller inquire who they were, but subsequently debited the agent with the price of the goods, thus electing him as his debtor. It was held that the seller, when he discovered the name of the real principal, could sue him for the price; seeing that, at the time when the seller debited the agent, although he knew that the agent was such, he did not know the name of the principal. Littledale, J., said; "It seems to me to be more consistent with the general principle of law, that the seller shall have his remedy against the principal rather than against any other person, to hold in this case, that the seller who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. . . . It is said that he ought to have ascertained, by inquiry of the agent, who the principal was; but I think that he was not bound to make such inquiry, and that by debiting the agent with the price of the goods he had not precluded himself from resorting to the principal, whose name was not disclosed to him."

13. When a third party gives credit to an agent for goods, thinking that the agent is the principal, or not knowing the name of the principal, if the principal be induced by the conduct of the seller to pay the money to the agent, on the faith that the seller and the agent have come to a settlement in the matter, or if any representation to that effect be made by the seller, either by words or by conduct, he cannot afterwards sue the principal—*vide Heald* v. *Kenworthy* (1855), 10 Ex. 739, and *Irvine* v. *Watson* (1880), 5 Q. B. D. 414. C. A.

Liability of Agent for Breach of Warranty of Authority.—A professing agent who represents that he has authority from another person (whom he names, and who is existent) to enter into a contract on his behalf, is held, by implication of law, to warrant that he has such authority as he represents himself to have, and is liable to be sued for any loss or damage caused to the third party by a breach of such implied warranty, even though the professing agent *bonâ fide* believed that he had the authority which he professed to have.

Collen v. *Wright* (1857), 7 E. & B. 301; here the defendant, who was the land agent of a gentleman named Gardner, professing to have authority to do so, agreed with the plaintiff to lease to him for a term of years a farm belonging to Gardner. The defendant had not in fact any authority to do so, and Gardner refused to ratify the contract and execute the lease. The plaintiff then brought this action against the executors of the agent, who were held liable for the loss sustained by the plaintiff. Willes, J., in delivering the judgment of the Exchequer Chamber, said; "The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have, does in point of fact exist."

Richardson v. *Williamson* (1871), L. R. 6 Q. B. 276; here Cockburn, C.J., said; "By the law of England, persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages for the breach of an implied warranty of authority. This was decided in *Collen* v. *Wright* (1857), 7 E. & B. 301, and other cases."

Firbank's Executors v. *Humphreys* (1886), 18 Q. B. D. 54. C. A; here Brett, M.R., said; "The rule to be deduced is, that where a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred."

The same rule seems to apply where the agent is without authority, owing to the incapacity of his supposed principal to give him any; as where the principal is a lunatic.

Drew v. *Nunn* (1879), 4 Q. B. D. 661. C. A.; here Brett, L.J., said; "In my opinion, if a person, who has not been held out as agent, assumes to act on behalf of a lunatic, the contract is void against the supposed principal, and the pretended agent is liable to an action for misleading an innocent person."

Where an agent is liable to be sued for breach of warranty of authority, he cannot of course either be sued or sue upon the contract itself; for in such cases, as there is a principal named and existent, the agent himself is not a contracting party at all.

Where, however, an agent knew that he had not the authority which he professed to have, there is, in addition

to an action for breach of warranty of authority, a further and alternative remedy against him in tort; and he is liable to be sued for damages for fraud, in the action of deceit—*vide Randell* v. *Trimen* (1856), 18 C. B. 786, and *Polhill* v. *Walter* (1832), 3 B. & Ad. 114. In the latter case an action was brought against the defendant for falsely and fraudulently representing that he was authorized to accept a bill of exchange by procuration. A bill had been presented at the office of the drawee for acceptance during his absence; and the defendant, who lived in the same house as the drawee, being assured by one of the payers that the bill was perfectly regular, wrote on the bill an acceptance as by the procuration of the drawee. The defendant had no authority to do so, but he honestly believed that the drawee would ratify the acceptance. The bill was dishonoured when due, and the indorsee brought an action against the drawee, and was non-suited. He then sued the defendant. At the trial the jury negatived all fraud and deceit in fact, on the part of the defendant; but the verdict was entered for the plaintiff, the Court holding that the defendant had been guilty of fraud in law, on the ground that he had made a representation knowing it to be untrue, and which was intended to induce another to act upon it to his detriment. In giving judgment, Lord Tenterden laid it down, that a corrupt motive of gain to the person making the representation, or injury to the person to whom it is made, is not necessary for the maintenance of the action of deceit.

A professing agent cannot be sued, for breach of an implied warranty of authority, or for deceit, by a third party who knew of the agent's want of authority when he entered into the contract—*vide Smout* v. *Ilbury* (1842), 10 M. & W. 1, and *Jones* v. *Hope* (1886), 3 T. L. R. 247. C. A. In the latter case, Brett, L.J., said; "But that does not apply where the person with whom the contract was supposed to have

been made, knows all the circumstances just as much as the agent himself; knows that the agent is not authorized, and then chooses to take the credit of the person, when he knows that the agent is not authorized to pledge it. In such a case I cannot think that an action (viz. for breach of warranty of authority, or for deceit) would lie."

It also seems that where a third party is mistaken in law as to the agent's authority, provided that he knew all the facts of the case, so that he could judge for himself whether the agent had in law the authority he was supposed to have, the agent could not be made liable.

Beattie v. *Lord Ebury* (1872), L. R. 7 Ch. 777; here Mellish, L.J., said; "I have no doubt myself that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law; that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances I have no doubt that the agent would not be liable."

With regard to the measure of damages recoverable for a breach of warranty of authority, it has been decided that the damages recoverable against the professing agent are not identical with those which would have been recoverable from the principal for not fulfilling the contract, if the agency had really existed.

In re National Coffee Palace Company (1883), 24 Ch. D. 367. C. A.; here it was laid down that, in such cases, the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal, if the defendant had had the authority which he professed to have; that is to say, what the plaintiff would have gained by the contract which the

defendant warranted should be made. This rule as to damages was followed by Charles, J., in *Meek* v. *Wendt* (1888), 21 Q. B. D. 126.

Liability of Principal to Third Party for his Agent's Torts.—1. The principal is liable for any loss or damage caused to a third party by the negligence of his agent while acting within the scope of his authority, or within the ordinary scope of his employment: the maxims, "Respondeat superior" and "Qui facit per alium facit per se," applying.

Patten v. *Rea* (1857), 2 C. B. N.S. 606; here a master was held responsible for an injury caused to a third party by the negligent driving of his servant when acting in the course of his employment as a servant.

Storey v. *Ashton* (1869), L. R. 4 Q. B. 476; here a wine merchant sent his carman and clerk in a cart to deliver some wine and bring back some empty bottles. The carman having delivered the wine and obtained the empties, was persuaded by the clerk, instead of returning straight to his master's premises, to drive the clerk in another direction on his own business. While so doing the carman negligently drove over a person who was crossing the road. It was held that the carman's master was not liable, as the negligent act of his carman was done outside the scope of his employment as his master's servant. Cockburn, C.J., said; "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant."

Bayley v. *Manchester, Sheffield, & Lincolnshire Railway Company* (1873), L. R. 8 C. P. 148; here a porter thinking erroneously that a passenger was in the wrong train pulled him out violently, and in so doing injured the passenger. It was part of the porter's duties to prevent passengers going by wrong trains; but not to pull them out of carriages. It was held that the company was liable for the porter's

wrongful act, seeing that it was done in the course of his employment. Kelly, C.B., said; "The principle to be deduced from the authorities on this subject is that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the servant was actually directed to do."

Whitely v. *Pepper* (1876), 2 Q. B. D. 276; here the carman of the defendant, who was a coal merchant, for the purpose of delivering coals to a customer, removed an iron plate in the footway which covered a coal cellar. The plaintiff fell into the opening and sustained injuries owing to the carman's negligence in not giving her any warning that the plate was taken up. The principal was held liable for the negligence of his carman.

Smith v. *Keal* (1882), 9 Q. B. D. 340; this was an action brought against an execution creditor for the wrongful seizure of the plaintiff's goods by the sheriff. Jessel, M.R., said; "In the first place it is clear that on principle a man is liable for another's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority."

Stevens v. *Woodward* (1881), 6 Q. B. D. 318; here a clerk, who had been expressly forbidden by his master to use his lavatory, did so, and carelessly left the tap running, which caused damage. It was held that the master was not liable for the clerk's negligent act, as it was not done within the scope of his authority, or of the ordinary duties of his employment.

Coupé Company v. *Maddick* (1891), 2 Q. B. 413; here a doctor hired a horse and carriage from the plaintiff company for a year, at two guineas per week. On returning home from a drive he told his coachman to take the carriage back to the stables, which were about two hundred yards away; but instead of so doing, the coachman picked up a friend and

took him off for a drive; in the course of the drive, owing to the coachman's negligence, who was drunk, the carriage was run into by a cab and damaged; and the plaintiff company sued the doctor for damages. The doctor was held liable; and in delivering the judgment of the Court, Cave, J., said; "When a wayfarer is injured by the negligence of a person who is driving a carriage along a highway, he has a right of action founded on tort against the driver; and if the driver is a servant driving in the course of his employment, he has also a remedy against the master, on the principle of "Respondeat superior;" but where a man hires a horse and carriage, there is an implied obligation on his part, arising out of the contract, to return them in the condition in which he received them, fair wear and tear and certain accidents excepted; and if they are injured by the negligence of the hirer's servant while driving in the course of his employment, the latter's remedy is by action on the contract, and can be enforced against the hirer only and not against his servant. That there is a difference between the hirer's liability to the owner and his liability to a wayfarer injured by the negligence of the person driving the carriage, is plain from the following instances. A hires a horse and carriage for a year, and lends it for a day to B, who negligently drives over and injures C, at the same time injuring the horse and carriage. In that case A is not responsible to C, because B is not his servant, and consequently the maxim "Respondeat superior" does not apply; but he is responsible to the owner of the horse and carriage for the damage done by B's negligence."

Smith v. *North Metropolitan Tramway Company* (1891), 7 T. L. R. 459. C. A.; here a tram conductor asked the plaintiff for his fare; and as owing to the crowd he could not get at his pocket he asked the conductor to wait a little. The conductor thereupon took plaintiff by the collar and pushed him off the car, whereby he fell and sustained severe injuries. The company were held liable for the injuries.

The Master of the Rolls, in giving judgment, said; "It is a case of master and servant, and all the decisions on the subject show that, where the relation of master and servant exists, the master, whether a corporation or an individual, is responsible for the acts done by the servant in the course of his employment, even though the particular act has been done wrongly and illegally, and against the express direction of his master."

2. The principal is liable for any loss or damage caused to a third party by the fraud or other wilful wrong or tort of the agent, if the wrong or tort was committed, either with the principal's authority; or in the ordinary scope of the agent's employment, and for the benefit of the principal. Moreover, if the wrong was committed in the ordinary scope of the agent's employment, and for the principal's benefit, the latter is liable even though he expressly forbade the agent to act in such a manner.

Udell v. *Atherton* (1861), 7 H. & N. 172; here, the defendant employed an agent to sell a log of mahogany for him. The agent, without his principal's authority or knowledge, made fraudulent representations as to its soundness. The principal was held to be liable for his agent's fraud.

Limpus v. *London General Omnibus Company* (1862), 1 H. & C. 526; here an omnibus driver, in racing a rival bus, pulled across the road, and so overturned the other bus. The driver had been expressly forbidden to race other busses. The company was held liable for the damage done, on the ground that the driver at the time of the accident was acting in the course of his employment, and for his master's benefit.

Barwick v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259; in delivering judgment in this case, Willes, J., said; "The general rule is that the master is answerable for every such wrong of the servant or agent as is

committed, in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad selling the cargo. . . . In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

Ward v. *General Omnibus Company* (1873), 42 L. J. C. P. 265; here an omnibus driver, intending to strike with his whip the driver of another bus, struck by mistake a passenger and injured him. The Court held that, whether the defendant company were liable or not for the act of their driver, depended upon whether he had struck the blow in private spite, or in the supposed furtherance of the employer's interest.

Mackay v. *Commercial Bank of New Brunswick* (1874), L. R. 5. P. C. 394; here the Privy Council, adopting the words of Willes, J., in *Barwick* v. *English Joint Stock Bank*, *ubi supra*, decided that the bank was liable for the fraud of their manager who, by a fraudulent representation, induced a customer to accept a bill in which the bank was concerned. For though the directors of the bank had no knowledge of the fraud, the manager had acted within the scope of his employment and the bank had received a benefit from the fraud.

Weir v. *Barnett* (1877), 3 Ex. D. 32; here the Court held that it had been settled law ever since the case of *Hern* v. *Nicholls* (1709), 1 Salk. 289 (in which case Lord Holt, C.J., held that a merchant was civilly, though not criminally, liable for the deceit of his factor) that a principal

is liable for the fraud of his agent committed in the conduct of his principal's business, and for his benefit.

Houldsorth v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; here Lord Selborne approved of the principle of the liability of a principal for his agent's wrongs as laid down by Willes, J., in *Barwick* v. *English Joint Stock Bank, ubi supra*. He also said; "It is of course assumed in all such cases that the third party who seeks the remedy has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal, and had no notice either of any limitation (material to the question) of the agent's authority, or of any fraud or other wrongdoing on the agent's part at the time when the cause of action arose."

Thorne v. *Heard* (1894), 1 Ch. 599. C. A.; in this case, which followed *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (1887), 18 Q. B. D. 714. C. A., it was held, that in order to make a principal liable for his agent's fraud, it must not only be committed within the scope of his employment, but must also be for the employer's benefit; and that the principal could not be liable for the fraudulent act of his agent even though the agent purported to act within the ordinary scope of his employment, if when the agent committed the fraud he did so not in the interests of his principal, but in his own interests.

It must be observed that, by virtue of 9 Geo. IV. c. 14, a principal cannot be held liable for any representation, even though fraudulent, made by his agent as to the pecuniary character of another person. Section 6 of the above Act provides; "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealing of any other person, to the intent and purpose that such other person may obtain credit, money, or goods upon it, unless such representation

or assurance be made in writing signed by the party to be charged therewith." For the effect of this section, *vide Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; here it was decided that the section meant that no man should be liable for a fraudulent representation as to another's means, unless he put it into writing and signed it himself.

3. If an agent, while acting within the scope of his authority, or within the ordinary scope of his employment, misappropriates any money or valuable thing which he has received from a third party, the principal will be liable to the third party for the loss—*vide Swire* v. *Francis* (1877), 3 App. Cas. 106, and *Chapleo* v. *Brunswick Permanent Building Society* (1881), 6 Q. B. D. 696. C. A.

4. Where a principal intentionally employs an agent who is ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he is dealing, the representation when made by the agent becomes a misrepresentation of the principal, and renders the principal liable for fraudulent misrepresentation.

Ludgater v. *Lowe* (1881), 44 L. T. 694, & 45 J. P. 600. C. A.; here the defendant's son represented that certain sheep which he sold for the defendant were all right. The defendant had fraudulently concealed from his son that the sheep had the rot, and fraudulently gave the son authority to sell them for the best price, intending that the son should represent that they were sound. The defendant was held liable for damages for fraudulent misrepresentation.

Liability of Agent to Third Party for his own Torts.—An agent, while acting in a representative capacity, is himself liable, as well as his principal, for any loss or damage caused to third parties by his wrongful or tortious acts, whether he has acted with the authority of his principal or not.

Stephens v. *Elwall* (1815), 4 M. & S. 259; here it was

held that a servant could be made liable in trover, though the act of conversion was done by him for the benefit of his master. Lord Ellenborough, C.J., said; "The only question is whether this is a conversion in the clerk, which undoubtedly was in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but nevertheless his acts may amount to a conversion: for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it."

Stevens v. *Midland Counties Railway Company* (1854), 10 Ex. 352, & 2 C. L. R. 1300; here Platt, B., said; "With respect to the argument of principal and agent: if A orders B to conduct a prosecution, and both know that the party charged is innocent, A and B are equally to blame. The fact of B obeying A's command is not enough to exonerate him, if he acts as the defendant Lander here acted."

Hugh v. *Abergavenny* (*Earl of*) (1874), 23 W. R. 40; here it was held that there could be no agency as between wrongdoers; that want of interest could not be any defence to a charge of tort, although the tort was committed under the direction of another; but that the wrongdoer became personally liable.

Cullen v. *Thomson* (1862), 6 L. T. 870, & 9 Jur. N.S. 85; here the House of Lords held that an agent or servant who joins with and assists his principal in the commission of a fraud is civilly liable for the consequence: for every one who is directly concerned in the commission of a fraud is a principal.

Agent's Admissions Evidence against his Principal.—1. An admission or declaration by any agent is evidence against his principal, provided that it is either made with his authority, or is made in the ordinary scope of his

employment, with reference to the subject-matter of the agency.

Peto v. *Hague* (1804), 5 Esp. 133; here it was held that what was said by an agent respecting a contract or other matter, in the course of his employment, which contract or matter was the foundation of the action, was good evidence to affect the principal: *aliter*, what was said by him on another occasion.

Schumack v. *Lock* (1825), 10 Moore 39; here it was held that declarations made by an agent or servant as to a particular fact are only admissible as evidence against his principal when they fall within the nature of his employment as such agent or servant.

Standage v. *Creighton* (1832), 5 C. & P. 406; here it was held that where an attorney's clerk has the general management of a cause, what he says is receivable in evidence just the same as if it had been said by the attorney himself.

Kirkstall Brewery Company v. *The Furness Railway Company* (1874), L. R. 9 Q. B. 468; here an action was brought against the defendants for the loss of a parcel containing money. The defendants pleaded the Carriers Act, and plaintiffs replied that the parcel was lost by the felonious act of one of the company's servants. In the course of the trial a superintendent of police at U. gave, after objection by the defendants, the following evidence: "I know P., the station-master at defendants' railway station at U. In consequence of a communication I went to him on Saturday the 30th of July. He told me that H., a parcel porter, had absconded from the service; that a money parcel was missing, and he, P., suspected H. had taken it; would I (the witness) make inquiries after him?" It was held that the above evidence was rightly admitted; for it must be taken that the station-master, being the person in charge there, had authority from the defendants to set the police in motion, and that what he said pertinent

to the occasion, when acting within the scope of his authority, was evidence against the defendants.

Garth v. *Howard* (1832), 1 M. & Scott. 628, & 8 Bing. 451; here it was held that statements made by the shopman of a pawnbroker, who is left in the shop to answer questions in his master's absence, can only be received in an action against the master when they relate to transactions which are strictly within the business of a pawnbroker; and are not receivable if they relate to an advance of money not within the Pawnbrokers Act, 39 & 40 Geo. III. c. 99.

Great Western Railway Company v. *Willis* (1865), 18 C. B. N.S. 748; here, in an action in the County Court against the railway company for not conveying cattle to market within a reasonable time, evidence was given of a conversation which took place a week after the alleged cause of action arose, between the plaintiff and a night inspector at one of the company's stations, whose duty it was to forward the cattle. In the conversation the latter, in answer to a question as to why he did not send the cattle on, stated that "he had forgotten them." It was held that such evidence was wrongly admitted, as it was not within the scope of the man's authority to make admissions as to bygone transactions.

2. Where a principal expressly refers another to a third person for information upon a particular matter, that third person becomes the agent of the principal for that particular purpose, and any admissions or declarations made by him concerning the matter in question are evidence against the principal.

Hood v. *Reeve* (1828), 3 C. & P. 532; here it was held that if a person, on being applied to on a particular matter, writes an answer, mentioning another person, and saying on one occasion, "He is in possession of my sentiments, and will attend;" and on another, "I have written

to him, and I refer you to him thereon;" such letters are sufficient to constitute the party referred to an agent in the business: and what he said at a meeting on the subject may be given in evidence against the principal.

Liability of Principal to Third Party for his Agent's Crimes.—As a general rule a principal cannot be made criminally liable for the criminal acts of his agent, unless those acts are done with his express or implied authority. For it is a well-established maxim of law that criminal responsibility can only attach to a man when it can be shown that the act with which he is charged was done with a criminal intent on his part—"Actus non facit reum, nisi mens sit rea."

R. v. *Huggins* (1731), 2 Str. 882; here Raymond, C.J., said; "It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behaviour. All the authors that treat of criminal proceedings proceed on the foundation of this distinction; that to affect the superior by the act of the deputy, there must be the command of the superior, which is not found in this case."

Sanderson v. *Baker* (1772), 3 Wils. 309, and *Woodgate* v. *Knatchbull* (1787), 2 T. R. 148; in these two cases it was decided that a sheriff, though liable civilly, is not liable criminally for the acts of his officers.

Of course if a principal expressly orders another to do a criminal act, then the principal is criminally responsible for that act. Where, however, a principal employs another to do something which can be done either in a criminal or in an innocent manner, and that other does it in a criminal manner, then the principal is not responsible.

There are, however, many cases where, by reason of the provisions of some statute, or from the peculiar nature of the offence, a principal is held criminally liable for the

acts of his agent, though done without his express or implied authority, or even though done against his express orders.

Sherras v. *de Rutzen* (1895), 1 Q. B. 918; here Wright, J., said; "There is a presumption that "*Mens rea*," an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but the presumption is liable to be displaced, either by the words of the statute creating the offence, or by the subject-matter with which it deals, and both must be considered."

Liability of a Principal for the Breach of Penal Statutes by his Agent.—Revenue Acts.—*Attorney-General* v. *Siddon* (1830), 1 Cr. & J. 220; here a trader had concealed smuggled tobacco in a cellar. When the tobacco was discovered, his servant procured a permit with the intention of protecting the tobacco from seizure. It was held that the master was liable in penalties for the illegal act of his servant, though he was absent at the time, and though the act was done upon the exigency of the moment; seeing that it was done by the servant in the conduct of his master's business, and for his benefit. In giving judgment, Bayley, B., said; "In the first place I consider this as being not properly a criminal proceeding, but a civil proceeding for the purpose of recovering that which is a debt of the Crown. It is a penal proceeding. . . . But whatever the nature of this proceeding is, whether penal or merely civil, this is a case in which, to my mind, the act of the servant is to be considered as being an act done in the master's business, and within the scope of the authority probably given by the master to the servant. . . . I am of opinion that in this case there was *primâ facie* evidence to show that the act of the servant was the act of the master. The master was certainly at liberty to have produced evidence for the purpose of rebutting that *primâ facie* case; but in the absence of any evidence to rebut that case, I am of opinion that it was rightly left to the

jury; and that the jury were bound to consider it as being the master's act, and that consequently the verdict on the seventh count is right."

R. v. *Dean* (1843), 12 M. & W. 39; 3 & 4 Will. IV. c. 53, s. 44, enacts, that every person who is concerned in the unshipping of goods, the duties for which have not been paid, etc., shall forfeit either the treble value thereof, or be liable to a penalty of £100. In this case it was held that each partner of a firm whose clerk had been guilty of a fraud, by removing some of the leaves of the Custom House book, and substituting others containing false entries of the quantity of goods imported, was liable to the penalty incurred through the act of their clerk; seeing that they derived a benefit from his fraud, and produced no evidence to rebut the *primâ facie* presumption, which arose from that circumstance, that they were privy to his act.

Licensing Acts.—*Mullins* v. *Collins* (1874), L. R. 9 Q. B. 292; section 16 of 35 & 36 Vict. c. 94 (The Licensing Act of 1872), makes it an offence for any licensed person to supply any liquor or refreshment, either by way of gift or sale, to a police constable on duty, without the authority of his superior officer. In this case the servant of a licensed victualler knowingly supplied liquor to a constable on duty without the authority of his superior officer. It was held that the licensed victualler was liable under the above section, though he had no actual knowledge of his servant's act. It seems probable, if we compare this case with the two following ones, that, although it was not proved here that the master had delegated his authority to the servant, nevertheless the presumption that such delegation had in fact taken place in the ordinary course of business, formed part of the grounds of the Court's decision—*vide* Foster's Law of Licensing, p. 124.

Somerset v. *Hart* (1884), 12 Q. B. D. 360; section 17 of 35 & 36 Vict. c. 94, provides, that if any licensed person suffers any gaming or any unlawful game to be carried on

on his premises, he shall be liable to a penalty. In this case gaming had taken place on licensed premises to the knowledge of a servant of the licensed person; but there was no evidence to show any connivance or wilful blindness on the part of the licensed person, nor did it appear that the servant was in charge of the premises. The Court held that the justices were right in refusing to convict the licensed person under these circumstances. In giving judgment, Lord Coleridge, C.J., said; "Slight evidence might be sufficient to satisfy the magistrates that the landlord might have known what was taking place if he had pleased; but where no actual knowledge is shown, there must, as it seems to me, be something to show either that the gaming took place with the knowledge of some person clothed with the landlord's authority, or that there was something like connivance on his part: that he might have known, but purposely abstained from knowing."

Bond v. *Evans* (1888), 21 Q. B. D. 249; here again, contrary to the provisions of section 17 of 35 & 36 Vict. c. 94, gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who had been left in charge of the licensed premises; but without any knowledge or connivance on the part of the licensed person: the Court held that the licensed person was guilty of having suffered gaming to be carried on upon his premises contrary to the provisions of the section.

Commissioners of Police v. *Cartman* (1896), 1 Q. B. 655; section 13 of 35 & 36 Vict. c. 94, provides, that if any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty. Here the respondent, who was a licensed person, gave orders to his servants that no drunken persons were to be served; during his absence, however, one of his servants sold intoxicating liquor to a drunken person. It was held that the act

of his servant made the respondent liable to the penalty under the statute, that act having been done by the servant within the ordinary scope of his employment, though contrary to his master's orders.

Metropolitan Slaughter-Houses Act, 1874 (37 & 38 Vict. c. 67).—*Collman* v. *Mills* (1897), 1 Q. B. 396; here a slaughterman, acting in direct disobedience of his master's orders, so as to save himself trouble, had slaughtered a sheep in a pound, in view of other sheep, contrary to a bye-law made under the provisions of the above-named Act. The material part of the bye-law in question was—

"An occupier of a slaughter-house (*a*) shall not slaughter or permit to be slaughtered any animal in any pound, pen, or lair, or in any part of the premises other than the slaughter-house; (*b*) shall not slaughter or permit to be slaughtered any animal within public view, or within the view of any other animal." The Court held that the master was liable to a penalty for the act of his slaughterman, though the act was done in direct disobedience to his orders. Wills, J., said; "It has been pointed out in many cases, that in businesses of this kind, which often are carried on upon an extensive scale, and necessitate the employment of numerous servants, legislation would be useless if the master were not liable to penalties for his servant's act, as well as the servant himself."

Section 8 of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).—This Act, which imposes penalties on pawnbrokers in various cases, provides that; "For the purpose of this Act, anything done or omitted by the servant, apprentice, or agent of a pawnbroker in the course of, or in relation to the business of the pawnbroker, shall be deemed to be done or omitted (as the case may be) by the pawnbroker himself."

Liability of a Principal for Public Nuisances committed by his Agent.—It seems that principals are liable to indictment for public nuisances committed by their agents within the ordinary scope of their employment, although the

particular nuisance in question may have been committed without the principal's authority and even against his express orders. Thus in Smith's Master and Servant (4th ed. p. 317), we find it stated; "Again, masters are liable to indictments for public nuisances, such as carrying on offensive trades, committed by their servants, though their masters have nothing to do personally with the nuisance complained of. In such cases, also, if a master could shield himself from criminal responsibility on the ground that he personally had nothing to do with the carrying on the trade, the real offender might escape with impunity, and the public grievance remain unredressed."

R. v. *Medley* (1834), 6 C. & P. 292; here the directors of a gas company were held liable upon an indictment for a nuisance committed by their superintendent and engineer in conveying the refuse of the gas into the Thames, whereby fish were destroyed and the water rendered unfit to drink. The act complained of was committed under a general authority to manage the works; but the directors were personally ignorant of the particular plan adopted, which was a departure from the original and understood method, which the directors had no reason to suppose had been discontinued. Lord Denman, C.J., said; "It seems to me both common sense and law, that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants."

R. v. *Stephens* (1866), L. R. 1 Q. B. 702; here it was decided that the owner of works carried on for his profit by his agents, was liable to be indicted for a public nuisance caused by the acts of such agents (viz. his workmen) in carrying on the works, though done by them without his knowledge and contrary to his general orders. In giving judgment, Mellor, J., said; "It is quite true that this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule

should prevail, with regard to such an act as is charged in this indictment, between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. Then, if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress. The object of the indictment is to prevent the recurrence of the nuisance."

Liability of a Principal for a Libel published by his Agent.—Previous to Lord Campbell's Act, 1843 (6 & 7 Vict. c. 96), a principal was liable criminally, as well as civilly, for any libel published by his agent or servant, in the ordinary course of his employment, even though the principal, *e.g.* a newspaper proprietor, was totally ignorant of the particular publication. This rule of law frequently worked great hardships upon newspaper proprietors; and it was therefore provided by section 7 of 6 & 7 Vict. c. 96, that "Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

Liability of Principal for Breach of Parliamentary Elections Law by his Agent.—A candidate or sitting M.P. is responsible, in a parliamentary sense, for all the acts of his election agent; and even though the authority of the

principal is only proved to have extended to legal acts, yet he will be held responsible for illegal acts done by such agent, or by a sub-agent acting under the authority of the chief agent, even though such acts be contrary to his express instructions. But a candidate or sitting M.P. can only be made liable in penalties, for the illegal acts of his agent, when such acts are proved to have been done with the actual knowledge and authority of such candidate or sitting M.P.

Norwich case (1869), 1 O'M. & H. 8; here Martin, B., said; "The law of agency which would vitiate an election is utterly different from that which would subject a candidate to a penalty or an indictment; and the question of his right to sit in Parliament has to be settled upon an entirely different principle"—*vide* also, the *Westminster case* (1869), 1 O'M. & H. 89, the *Taunton case* (1869), 1 O'M. & H. 181, and the *Bridgwater case* (1869), 1 O'M. & H. 112.

Of course the principal's liability to answer criminally for his agent's act, does not in any way exempt the agent from criminal liability for his own act.

CHAPTER VI.

DETERMINATION OF AGENCY.

THE relationship of principal and agent may be terminated either by the act of the parties themselves, or by operation of law.

1. By Act of Parties.—(*a*) It may be terminated by mutual agreement.

(*b*) It may be terminated by the revocation of the authority on the part of the principal; or by the renunciation of the authority on the part of the agent.

Revocation by Principal.—Generally speaking, a principal has a right to revoke the authority of his agent, at his will, any time before it is executed. And even if the authority has been partly executed, provided it admits of severance, it may be revoked as to the unexecuted part —*vide* Smith's Mercantile Law (10th ed. p. 159), and the following cases:—

Vynior's case, 8 Co. 82*a*, *Farmer* v. *Robinson* (1809), 2 Camp. 338*n*., *Campanari* v. *Woodburn* (1854), 15 C. B. 400, and *Warwick* v. *Slade* (1811), 3 Camp. 127. In the last case the Court held that the authority of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip, until such time as they have actually subscribed the policy.

Venning v. *Bray* (1862), 2 B. & S. 502; here it was laid down that, excepting in those few cases where an

authority is irrevocable, it is revocable even though conferred by deed.

Read v. *Anderson* (1882), L. R. 10 Q. B. D. 100; here Hawkins, J., said; "As a general rule, a principal is no doubt at liberty to revoke the authority of his agent at his mere pleasure."

Alexander v. *Davies and Company* (1885), 2 T. L. R. 142; here it was decided that the employment of a commission agent in London could be determined at will by the principal.

Henry v. *Lowson* (1885), 2 T. L. R. 199; here it was decided that the employment of an agent could be determined at the will of the principal.

Doward, Dickson and Company v. *Williams and Company* (1889), 6 T. L. R. 316; here the Court held that where a man had authorized an agent to collect debts for him at a commission for five years, he could revoke such authority at his will.

Where an authority has been conferred on an agent by two or more principals jointly, it may be revoked by any one of those principals—*vide Bristow* v. *Taylor* (1817), 2 Stark. 50.

A principal may revoke the authority either expressly, or impliedly; thus, it would be impliedly revoked if the principal appointed another person to do the same work as the agent, in a case where it was necessarily incompatible for both persons to act as agents in the matter.

Limitations on a Principal's Right of Revocation.—An authority is, of course, irrevocable, where it is expressly agreed, upon good consideration, that it shall be so; but it is essential that there shall be good consideration for an agreement not to revoke, for otherwise it would merely be a "nudum pactum."

Smart v. *Sandars* (1848), 5 C. B. 895; here Wilde,

C.J., said; "An authority is in its nature revocable by the donor of it (*Vynior's case*, 8 Co. 82*a*.); it is only when it is sought to make it irrevocable that a consideration is required to give that effect."

With regard to the revocation of powers of attorney, sections 8 and 9 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), make the following provisions:—

Section 8.—(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence, of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Section 9.—(1) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

When a principal revokes the authority of his agent, the revocation as between himself and his agent does not take effect till such agent has notice thereof.

In re Oriental Bank (1884), 28 Ch. D. 634; here Chitty, J., said; "Unquestionably advice is required in order to terminate the authority of an agent where the revocation is by the act of the principal. The cases of revocation by bankruptcy and death stand on a different footing."

We find in Story on Agency (9th ed. sect. 470), "As to the agent himself, subject to what has been already stated, it (revocation) takes effect from the time when the revocation is made known to him; and as to third parties

when it is made known to them, and not before. Until, therefore, the revocation is so made known, it is inoperative."

With regard to third parties, it is clear that a principal cannot privately revoke an authority which he has publicly given; for an authority revoked by act of party can only affect third parties from the time the revocation is made known to them, and not before.

Scarfe v. *Jardine* (1882), 7 App. Cas. 345; here Lord Blackburn said; "Where a person has given authority to another, the authority being such as would apparently continue, he is bound to those who act upon the faith of that authority, though he has revoked it, unless he has given proper notice of the revocation."

Debenham v. *Mellon* (1880), 5 Q. B. D. 403, & 6 App. Cas. 24; here it was laid down that if a husband has habitually allowed his wife to pledge his credit with a tradesman, he will be liable upon her contracts until the tradesman has received notice of the termination of such authority.

Cases where there is an Actual Contract to employ Agent.—Of course there is a great distinction between a principal merely giving an agent authority to act for him and a principal actually contracting to employ an agent to act for him. Where a principal actually contracts to employ an agent for a definite period, or to employ him to do an entire piece of work, as where a captain is employed to navigate a ship on a particular voyage, then the principal would be liable for breach of contract, if he dismisses the agent from such employment. And even if the principal only contracts to employ the agent indefinitely, provided there is an actual contract to employ, he will, in the absence of custom or special agreement to the contrary, be liable for breach of contract, if he dismisses him from such employment without giving him a reasonable notice.

Rhodes v. *Forwood* (1876), 1 App. Cas. 256; here a

colliery owner agreed with certain merchants in Liverpool to employ them for seven years as his sole agents for his coal in Liverpool, at a commission ; and they agreed to act for no other principal at Liverpool in that business for the seven years. Before the seven years had expired, the colliery owner sold his colliery, and ceased to employ the said agents, who brought an action for damages for breach of contract. The House of Lords held that though the principal, so long as he carried on that particular business in Liverpool, was bound to employ the plaintiffs as his sole agents in such business, in the absence of express agreement, there could not be an implied condition compelling the defendants to carry on their business for seven years; and that under the circumstances the defendants were not guilty of a breach of contract in ceasing to employ the plaintiffs.

Turner v. *Goldsmith* (1891), 1 Q. B. D. 544; here the defendant, a shirt manufacturer, agreed to employ the plaintiff, and the plaintiff agreed to serve the defendant as his agent and traveller for five years, at a commission, to sell the various goods manufactured or sold by the defendant, that should be from time to time forwarded or submitted by sample or pattern to him, at list price, to good and substantial customers. After about two years the defendant's manufactory was burnt down: he did not resume business, and thenceforth ceased to employ the plaintiff, who brought an action against him for breach of contract.

The Court of Appeal held that as there had been an express contract to employ the plaintiff for five years, and as, from the facts of the case, the parties could not be taken to have contemplated the continuance of defendant's manufactory as the foundation of the employment, the defendant was not excused from fulfilling the agreement by the destruction of his manufactory, but was guilty of a breach of contract in ceasing to employ the plaintiff.

It seems upon comparing the two above cases, that the real distinction between them is, that in *Rhodes* v. *Forwood* the principal had only bound himself to employ the agent in a particular business at a particular place, without in any way binding himself to carry on such business longer than he chose; while in *Turner* v. *Goldsmith* the principal had bound himself to employ the agent unconditionally for a definite period.

We sometimes find cases where there is an agreement on the part of the agent to serve, without there being any agreement on the part of the principal to employ.

Burton v. *The Great Northern Railway Company* (1854), 9 Ex. 507; here the plantiff agreed, on October 1st, 1851, to convey between certain places all merchandise presented to him for that purpose, for five shillings per ton: the agreement to continue in force for twelve months. Plaintiff bought waggons and horses and began to carry under the agreement. On the 18th of March of the same year, the plantiff received notice that the agreement would cease from the following 1st of April. It was decided that the carrier was merely agent to carry such merchandise as was presented to him, but that the defendants were not under any liability to present merchandise for carriage; and that therefore no part of the contract had been violated.

An Authority Coupled with an Interest.—When a principal has given an agent an authority coupled with an interest, such an authority is not revocable by the principal. An authority coupled with an interest may be defined as, "An authority given upon good consideration for the purpose of securing some benefit to the donee of the authority."

Wilkinson v. *Wilkinson* (1818), 3 Swanst. 527; here a person gave a power of attorney to a creditor authorizing him to receive certain rents in payment of the debts owing to him. The Court held that this was an authority coupled with an interest and was irrevocable.

Gaussen v. *Morton* (1830), 10 B. & C. 731; here a power of attorney was given to a creditor to sell certain lands of his debtor, and to apply the proceeds in payment of a debt due to himself and partners. It was held that this was an authority coupled with an interest and was irrevocable.

Smart v. *Sandars* (1848), 5 C. B. 895; here goods were consigned for sale to a factor, who subsequently made advances to his principal. The principal at request having neglected to repay such advances, the factor sold the goods contrary to his principal's orders. It was held that the factor's authority was not one coupled with an interest, and that he had no right to have sold the goods. Wilde, C.J., in delivering judgment, said; "It appears to be that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority, such an authority is irrevocable. That is what is meant by an authority coupled with an interest, and which is commonly said to be irrevocable We think this doctrine only applies to cases where the authority in given for the purpose of being a security, or, as Lord Kenyon expresses it, as a part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards and incidentally only. . . . The making of such an advance (by a factor) may be a good consideration for an agreement that the authority shall be no longer revocable, but such an effect will not, we think, arise independently of agreement."

Clerk v. *Laurie* (1857), 2 H. & N. 199; here Williams, J., said; "What is meant by an authority coupled with an interest being irrevocable is this—that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable."

Read v. *Anderson* (1882), 10 Q. B. D. 100; here the plaintiff, a turf commission agent and a member of Tattersall's,

was employed to make a bet for the defendant. After the bet had been made and lost, the defendant ordered plaintiff not to pay the bet; but the plaintiff did pay it, to avoid being posted as a defaulter at Tattersall's, and sued the defendant for the amount. Hawkins, J., held that the plaintiff was entitled to recover from the defendant, on the ground that the liability to be posted as a defaulter at Tattersall's was an "interest," and made the plaintiff's authority irrevocable.

Hawkins, J.'s decision was affirmed in the Court of Appeal, but upon another ground (*vide* p. 67, *ante*). And it seems very improbable that the wide interpretation of an authority coupled with an interest, given by Hawkins, J., would be upheld by the Courts. And, at all events, by force of the Gaming Act of 1892 (55 Vict. c. 9), the principle could not now apply to a betting contract.

In Re Hannan's Empress Gold Mining and Development Company (1896), 2 Ch. 643, & 75 L. T. 54. C. A.; here the Court of Appeal approved of the above quoted passage in the judgment of Williams, J., in *Clerk* v. *Laurie, ubi supra.*

Where an authority has been partly executed, and cannot be revoked without causing loss or damage to the agent, it becomes irrevocable, on the ground that a principal is bound to indemnify his agent against any loss or damage that he may incur in transacting the agency. This was laid down by the Court of Appeal in *Read* v. *Anderson* (*vide* p. 67, *ante*). And though, by force of the Gaming Act of 1892, this case is no longer law, there seems no doubt that the principle as there laid down still holds good in cases of non-gaming contracts—*vide Seymour* v. *Bridge* (1885), 14 Q. B. D. 460, and other cases which deal with the question of the indemnification of an agent by his principal.

Renunciation by Agent.—It seems that a remunerated agent, who has accepted an appointment as agent upon valuable consideration, is not entitled to renounce and throw

up such agency at will, and that if he does do so, he will be liable to his principal for any loss or damage that the latter may suffer by reason of his renouncing the agency.

But if the agent is an unremunerated or gratuitous agent, then he is entitled to renounce, at his will. But even an unremunerated agent is bound to give his principal reasonable notice of his intention to renounce.

In Story on Agency (9th ed. sect. 478) we find it laid down as follows:—

"The agency may be determined by the renunciation of the agent. This renunciation may be before any part of the authority is executed, or when it is in part executed. But in either case, if the agency is founded upon a valuable consideration, the agent, by renouncing it, makes himself liable for any damage which his principal may sustain thereby. If the agency is purely gratuitous, then, according to our law, the principal will not be entitled to any damages for its non-execution. But if it was in part executed and then renounced, and the principal sustains damages thereby, the agent will be held responsible therefor, upon the known distinction between non-feasance and misfeasance in cases of gratuitous agency. But in all cases where the agent renounces his agency, he would seem bound to give notice thereof to the principal."

In Evans on Agency (2nd. ed.) we find it laid down as follows:—

"An agent may, of course, renounce his agency at any stage; but if the agency has been undertaken for a valuable consideration, he will be liable in damages to his principal; and the same rule will apply even in the case of gratuitous undertakings, which have been performed in part by the agent."

2. By Operation of Law.—(*a*) It may be terminated by the complete performance of the object of the agency; as where an agent employed to purchase a piece of land duly purchases it.

(*b*) It may be terminated by the expiration of a fixed period, when a definite period has been fixed, by the contract establishing the agency, during which the agency is to last.

(*c*) It may be terminated by the subject-matter of the agency ceasing to exist.

Whether the determination of the subject-matter terminates the agency or not, seems to depend upon whether the parties, when making the contract of agency, contemplated the continuance of the subject-matter as the foundation of the employment or not—*vide Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, and *Turner* v. *Goldsmith* (1891), 1 Q. B. D. 544, at pp. 138, 139, *ante*.

(*d*) It may be terminated by the death of either of the parties, or by the incapacitating illness of the agent.

The authority is at once terminated by the death of either the principal or the agent.

Wallace v. *Cook* (1804), 5 Esp. 116; here it was held that it was illegal for an agent to pay money, under a power of attorney, after the death of his principal.

Smout v. *Ilbery* (1842), 10 M. & W. 1; here a butcher, who had been in the habit of supplying meat at the house of a married man, continued to supply the wife after the husband had gone abroad. The husband died abroad; and the butcher sought to recover from the wife for the meat supplied between the date of the husband's death and the receipt of the intelligence in England. It was held that the wife was not liable, seeing that no personal liability will attach to an agent who enters into a contract in ignorance of the death of his principal, even though the third parties are also ignorant of the death.

Campanari v. *Woodburn* (1854), 15 C. B. 400; here it was held that an agent's authority is revoked by the death of the principal.

Pool v. *Pool* (1889), 58 L. J. Prob. 67; here it was held that the retainer of a solicitor was revoked by the death of

his client, and that he was not entitled to costs for items incurred subsequently to the death of such client, and before he heard of the death.

It seems that no liability will attach to the estate of a deceased principal upon contracts entered into by his agent, after such principal's death.

Blades v. *Free* (1829), 9 B. & C. 167; here it was held that the executors of a deceased were not liable for necessaries supplied, after deceased's death, to a wife (or mistress cohabiting as a reputed wife), even though the persons supplying such necessaries had received no notice of the death.

Farrow v. *Wilson* (1869), L. R. 4 C. P. 744; here Willes, J., in delivering the judgment of the Court, said; "Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and in respect of service after death, the contract is dissolved, unless there be a stipulation express or implied to the contrary."

It is, however, possible, from an opinion expressed by Brett, L.J., in the following case, that if the question were to come before the Courts now, that they might attach a liability to the estate of a deceased principal.

Drew v. *Nunn* (1879), 4 Q. B. D. 661. C. A.; here Brett, L.J., said; "Suppose that a person makes a representation, which after his death is acted upon by another in ignorance that his death has happened; in my view, the estate of the deceased will be bound to make good the loss which may have occurred through acting upon that representation. It is, however, unnecessary to decide this point to-day."

It is probable that even an authority coupled with an interest is revoked by the death of the principal.

Watson v. *King* (1815), 4 Camp. 272; here the sale of certain shares of a ship, under a power of attorney given to a creditor in discharge of his debt, was decided to be void, although the creditor had received no notice of the principal's death at the time of the transaction. In giving judgment, Lord Ellenborough said; "A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death."

In Story's Agency (9th ed. sect. 483), however, we find it stated that an authority coupled with an interest is not revoked by the death of the principal.

With regard to the revocation of powers of attorney by the death of the principal—*vide* sections 8 and 9 of the Conveyancing Act, 1882, which are set out upon pp. 136, 137, *ante*.

Section 47 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), also makes the following provisions regarding the effect that a principal's death has upon a power of attorney.

Section 47.—(1) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer, if the payment had not been made by him.

(3) This section applies only to payments and acts made and done after the commencement of this Act.

As a general rule, the death of an agent will terminate the authority of any sub-agent whom he may have appointed ; but this, of course, would not be the case where it had been agreed with the principal that the sub-agent was to become his sole agent—*vide* Story on Agency (9th ed. sect. 490).

The services of an agent being clearly of a personal nature, it seems that the agency will be terminated by the incapacitating illness of the agent.

Robinson v. *Davison* (1871), L. R. 6 Ex. 269; here a pianist, who was incapacitated by a dangerous illness from playing at a concert, as she had agreed to do, was held to be discharged from her contract on the ground that, where there is a contract to perform a personal service, which cannot be performed by a deputy, and which in case of death cannot be performed by the deceased's executors, incapacity of body or mind in the promisor, without any default of his or her own, will excuse performance in the absence of any special agreement that such incapacity shall not excuse.

(*e*) It may be terminated by the bankruptcy of the principal.

The bankruptcy of the principal at once terminates the agent's authority with regard to all those proprietary rights of which the bankrupt is divested, and which, under the provisions of section 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), are vested in the trustee, from the date of the act of bankruptcy.

Markwick v. *Hardingham* (1880), 15 Ch. D. 339. C. A., & 43 L. T. 647; here it was held that upon the plaintiff's bankruptcy, the defendant ceased to be the agent and attorney of the plaintiff, and did not become the agent of the assignee.

But if a transfer of a bankrupt principal's property is made after the act of bankruptcy, but before the adjudication, by his agent, to a *bonâ fide* purchaser for value, who has had no notice of the act of bankruptcy, then the transfer is good against the trustee.

In re Douglass, ex parte Snowball (1872), L. R. 7 Ch. 534; here it was held that although, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy, still, if after the act of bankruptcy, but before the adjudication, property is conveyed under the power to a *bonâ fide* purchaser who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustees.

Elliott v. *Turquand* (1881), 7 App. Cas. 79; here it was held that, where an authority had been given previous to an act of bankruptcy, by the bankrupts, to an agent in the course of mutual dealings to receive the purchase-money of their estate and to place it to account, and such authority had been acted upon before notice of an act of bankruptcy, that such authority was not revoked by the act of bankruptcy; that the payment was a rightful payment, and that being so received, it became an item in the account between the agent and the bankrupts before notice of any act of bankruptcy; and that the agent was entitled to set-off (under the Bankruptcy Acts) against it, in an action brought by the trustee in bankruptcy, a debt due from the bankrupts to him.

It seems, however, that the bankruptcy of the principal does not terminate his agent's authority to do a merely formal act of duty, for the completion of title—*vide Dixon* v. *Ewart* (1817), 3 Mer. 322.

It seems doubtful, whether an authority coupled with an interest, is revoked by the bankruptcy of the principal or not.

Hovill v. *Lethwaite* (1804), 5 Esp. 157; here it was held that an authority coupled with an interest was revoked by the bankruptcy of the principal.

Alley v. *Hotson* (1815), 4 Camp. 325; here Lord Ellenborough held that an authority coupled with an interest was not revoked by the subsequent bankruptcy of the principal.

In Story's Agency (9th ed. sect. 483), we find it stated that an authority coupled with an interest is not revoked by the bankruptcy of the principal.

With regard to the revocation of powers of attorney by the bankruptcy of the principal—*vide* sections 8 and 9 of the Conveyancing Act, 1882, which are set out upon pp. 136, 137, *ante*. Also *vide* section 47 of the Conveyancing Act, 1881, set out upon pp. 146, 147, *ante*.

It seems that the authority of an agent is also terminated by his own bankruptcy.

Hudson v. *Granger* (1821), 5 B. & Ald. 27; here it was held that the agent's bankruptcy terminated his authority to receive any money on account of his principal.

(*f*) It may be terminated by the insanity of the principal. It seems probable that the insanity of a principal terminates an authority given to an agent when sane, provided that the insanity is of such a nature as to render him utterly incapable of understanding what he is doing.

Drew v. *Nunn* (1879), 4 Q. B. D. 661. C. A.; here the defendant when sane held out his wife as his agent with authority to buy goods from the plaintiff. He afterwards became insane; but his wife, without giving plaintiff any notice of her husband's insanity, continued to order goods from him, which plaintiff supplied in ignorance that the husband had become insane. The defendant recovered, and

refused to pay for the goods supplied during his insanity. It was held that the defendant was liable for the price of the goods on the ground that, whether the insanity put an end to the authority or not, the defendant, by holding out his wife as his agent, entered into a contract with the plaintiff that she had authority to act on his behalf, and that until plaintiff had notice that his authority was determined, he was entitled to act upon the defendant's representations.

In this case the following opinions were expressed by the Court with regard to the effect of the principal's insanity upon the authority he had given:—

Brett, L.J., said; "In my opinion insanity of this kind does put an end to the agent's authority.

"I may remark that from the mere fact of mental derangement, it ought not to be assumed that a person is incompetent to contract; mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he has entered."

Bramwell, L.J., said; "I think that in order to annul the authority of an agent, insanity must amount to dementia. If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purposes of contracting."

In Story's Agency (9th ed. sect. 481), we find it stated; "If a principal should become insane, that would or might operate as a suspension or revocation of the authority of his agent during the continuance of the insanity; for the party himself during his insanity could not personally do a valid act, and his agent cannot therefore, in virtue of derivative authority, do a valid act for him."

With regard to the revocation of powers of attorney by the insanity of the principal—*vide* sections 8 and 9 of the Conveyancing Act, 1882, which are set out upon pp. 136, 137,

ante. Also *vide* section 47 of the Conveyancing Act, 1881, set out upon pp. 146, 147, *ante.*

The insanity of the agent himself will undoubtedly terminate his authority; for no principal could intend to bind himself by anything done by an agent in such a condition—*vide* Story's Agency (9th ed. sect. 487).

CHAPTER VII.

PUBLIC AGENTS.

AGENTS who act on behalf of the Public or Government are called public agents. No action will lie against a public agent for any contract entered into by him in his public character or employment. This rule is based on principles of public policy; for otherwise persons would often be deterred from accepting public offices for fear of the number of actions which might be brought against them.

Macbeath v. *Haldimand* (1786), 1 T. R. 172; here it was held that an official appointed by the Government, and acting as an agent for the Public, is not liable to be sued upon contracts entered into by him in that capacity.

Gidley v. *Lord Palmerston* (1822), 3 Brod. & Bing. 275; here it was held that an action would not lie against the Secretary of State for War, at the suit of a retired clerk of the War Office, for his retired allowance. In giving judgment, Dallas, C.J., said; "An action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment, and constituting a particular and personal liability: such persons, said Lord Mansfield, in one of the cases cited at the Bar, are not understood personally to contract."

O'Grady v. *Cardwell* (1873), 21 W. R. 340; here it was held that the Secretary of State for War is not liable to be

sued for breach of a contract entered into by him on behalf of the War Department.

Palmer v. *Hutchinson* (1881), 6 App. Cas. 619; here it was held that the defendant, who was her Majesty's Deputy Commissary-General for Natal, could not be sued either personally or in his official capacity upon a contract entered into by him on behalf of the Commissariat Department; and that there was no cause of action against him.

Dunn v. *MacDonald* (1897), 1 Q. B. 555. C. A.; in this case, Lopes, L.J., said; "The liabilities of public agents on contracts made by them in their public capacity are on a different footing from the liabilities of ordinary agents on their contracts. In the former case, unless there is something special which would be evidence of an intention to be personally liable, an agent acting on behalf of a Government is not liable for breach of a contract made in his public capacity, even though he would, by the terms of the contract, be bound if it were an agency of a private nature. That is the law which has been established by a number of cases for many years past."

Lord Esher, M.R., also said; "No action lies against a public servant upon any contract which he makes in that capacity, and an action will only lie upon an express personal contract."

The Government is never liable for torts committed by its agent or servants. Such agents or servants, however, are, equally with private ones, themselves personally liable for their own tortious acts.

Lane v. *Cotton* (1701), 1 Ld. Ray. 646; here an action was brought against the Postmaster-General for the loss of a letter, containing exchequer bills, through the negligence of his servants. Three judges against one held that the plaintiff could not recover.

Whitfield v. *Lord le Despencer* (1778), 2 Cowp. 754;

here it was held that the plaintiff could not recover from the Postmaster-General the amount of a bank-note, stolen out of a letter by one of the letter-sorters.

Rowning v. *Goodchild* (1773), 2 W. Bl. 909; here it was held that a deputy-postmaster was personally liable for non-delivery of letters gratis in a country post-town.

In delivering the judgment of the Court, De Gray, C.J., said; "We think that in all cases deputies are answerable for their own personal misfeasance, such as detaining the letters in question; and in the present case the deputies are made by the Act of Parliament, *ex necessitate rei*, substantive officers, and their duty pointed out as such. And it is better for the subject to resort to them for satisfaction for injuries done by themselves than to their principals."

Nicholson v. *Mouncey* (1812), 15 East. 384; here it was held that the captain of a man-of-war was not liable for damage done by her running down another vessel, through the negligence or default of a subordinate officer, who, at the time of the accident, had the actual direction and management of the ship.

If the Crown ratifies the act of its agent or servant, such agent or servant is freed from all personal liability.

Buron v. *Denman* (1848), 2 Ex. 167; in this case, Parke, B., said; "If an individual ratifies an act done on his behalf, the nature of the act remains unchanged; it is still a mere trespass, and the party injured has his option to sue either: if the Crown ratifies an act, the character of the act becomes altered; for the ratification does not give the injured party the double option of bringing his action against the agent who committed the trespass, or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass."

APPENDIX.

FACTORS ACT, 1889.

52 & 53 VICT. c. 45.

A.D. 1889

An Act to amend and consolidate the Factors Acts.

[26th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

Definitions.

1. For the purpose of this Act—

(1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods :

(2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf :

(3.) The expression "goods" shall include wares and merchandise :

(4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate,

and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

(5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

(6.) The expression "person" shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

Powers of mercantile agent with respect to disposition of goods.

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned

documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of pledges of documents of title.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Pledge for antecedent debt.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights acquired by exchange of goods or documents.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Agreements through clerks, &c.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Provisions as to consignors and consignees.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

Disposition by seller remaining in possession.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Disposition by buyer obtaining possession.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Effect of transfer of documents on vendor's lien or right of stoppage in transitu.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

Supplemental.

Mode of transferring documents.

11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by

custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Saving for rights of true owner.

12.—(1.) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

Saving for common law powers of agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exerciseable by an agent independently of this Act.

Repeal.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

Commencement.

15. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Extent of Act.

16. This Act shall not extend to Scotland.

Short title.

17. This Act may be cited as the Factors Act, 1889.

SCHEDULE.

Section 14.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Repeal.
4 Geo. 4. c. 83. .	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandises entrusted to factors or agents.	The whole Act.
6 Geo. 4. c. 94. .	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39. .	An Act to amend the law relating to advances bonâ fide made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c. 39.	An Act to amend the Factors Acts.	The whole Act.

SALE OF GOODS ACT, 1893.

56 & 57 VICT. c. 71.

An Act for codifying the Law relating to the Sale of Goods. A.D. 1893.

[20th February, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Unpaid seller defined.

38.—(1.) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(*a.*) When the whole of the price has not been paid or tendered ;

(*b.*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2.) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Unpaid seller's rights.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property

in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a.*) A lien on the goods or right to retain them for the price while he is in possession of them;

(*b.*) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(*c.*) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

Attachment by seller in Scotland.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien.

Seller's lien.

41.—(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(*a.*) Where the goods have been sold without any stipulation as to credit;

(*b.*) Where the goods have been sold on credit, but the term of credit has expired;

(*c.*) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

Part delivery.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Termination of lien.

43.—(1.) The unpaid seller of goods loses his lien or right of retention thereon—

(*a.*) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(*b.*) When the buyer or his agent lawfully obtains possession of the goods;

(*c.*) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu.

Right of stoppage in transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Duration of transit.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage in transitu is effected.

46.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller.

Effect of sub-sale or pledge by buyer.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto:

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer

was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

Sale not generally rescinded by lien or stoppage in transitu.

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

SCHEDULE.

Section 60.

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. 1, c. 21.	An Act against brokers. The whole Act.

ENACTMENTS REPEALED—*continued.*

Session and Chapter.	Title of Act and Extent of Repeal.
29 Cha. 2, c. 3.	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen.*
9 Geo. 4, c. 14.	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven.
19 & 20 Vict. c. 60.	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97.	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two.

* Commonly cited as sections sixteen and seventeen.

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THE END.

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